

A Terrible Purity: International Law, Morality, Religion, Exclusion

Tawia Ansah

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Ansah, Tawia (2005) "A Terrible Purity: International Law, Morality, Religion, Exclusion," *Cornell International Law Journal*: Vol. 38: Iss. 1, Article 2.

Available at: <http://scholarship.law.cornell.edu/cilj/vol38/iss1/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

A Terrible Purity¹: International Law, Morality, Religion, Exclusion

Tawia Ansah†

Introduction	9
A. Religion and the Rule of Law: Passion Versus Reason? ..	9
B. Exclusion of Faith as “the Abject”: A Critique of the Rationalist Paradigm	14
C. Rationalism and Positivist Exclusion	17
I.	21
A. Legal Authority Construed as the Suppression of Religion Within Moral Discourse	21
B. Law and Practical Morality	24
C. Intertext: the Self, the State, and Exclusion as a Strategy	28
D. Morality and Positivism	30
E. Transmigration (or, the Immanence of Religion)	39
II.	41
A. The Myth of Progress: Morality as Object	41
B. Negative Liberty as Paradigm of Modern Morality	54
III. Innocent Self, Sinful Other: Consequences of Moral Purity	63
Conclusion	67

Introduction

A. Religion and the Rule of Law: Passion Versus Reason?

“[Religion] gets in the way of morality.”

Kim Campbell, former Prime Minister of Canada, March 17, 2004²

1. Title inspired by an article by Harriet McBryde Johnson in which these words appear. Harriet McBryde Johnson, *Unspeakeable Conversations or How I Spent One Day as a Token Cripple at Princeton University*, N.Y. TIMES MAGAZINE, Feb. 16, 2003, at 79.

† LL.B., University of Toronto Faculty of Law, Ph.D.; Columbia University; Assistant Professor, New England School of Law; Director, Center for International Law and Policy. I presented versions of this paper at three fora: the Seventh Annual Conference on Law, Culture and the Humanities, University of Connecticut School of Law, March 12-13, 2004; the Junior Faculty Exchange at Northeastern University School of Law, meeting in November 2004; and Bingham McCutchen International Law Symposium, University of Connecticut School of Law, “The New American Hegemony?” conference on October 17, 2003. I am grateful for the comments, criticisms, and suggestions from participants at each event. I also thank Peter Manus and Allison Dussias for their insights upon reading earlier versions of this article. I thank the New England School of Law Board of Trustees for its support.

2. *Real Time with Bill Maher* (HBO television broadcast, Mar. 17, 2004).

This Article argues that the separation between law and religion is porous. The border between them must be constantly maintained and policed. Positive law and the norm of the secular self are heavily invested in maintaining the purity of those boundaries. But the maintenance of purity is at cost. One cost is the construction of the religious other as the repudiated, the abject. This Article attempts to look at these separations, constructions, and bulwarks, facilitated by the legal framework, from both a secular and a religious perspective.

Sara Dillon has recently discussed the possibility of the European Union (EU) becoming an "alternative superpower."³ She suggests that while the EU's incrementalist "method," at least insofar as the legal paradigm, is successful in a number of ways, it seems unable to permit the development of a unified foreign policy that could counterbalance U.S. dominance in international affairs.⁴ Dillon notes that a principal weakness of incrementalism is its suppression of passion, emotion, and the old "blood and soil" narratives that, despite their evils, ignited the political imagination:

[B]eneath the rational surface of the EU lurks not a more energetic Europe, but a [longing to] return to the very blood and soil irrationality that the EU had sought to banish over a long process of conceptual exile. It is unclear whether the tedium and distance, even inhumanity, inherent in constructing a global identity on the values of a negative rationality ("we will not emote"), especially in light of the complexity of planning involved, can succeed.⁵

Dillon expresses the hope that the "new and audacious"⁶ European project, particularly in the pursuit of a coherent foreign policy, could be reimagined with an infusion of passion "self-consciously, and nobly, repressed since the 1950s,"⁷ but transcribed in pacific terms.⁸ She reposes these hopes in the new European constitution.⁹ Interestingly, of course, one of the principal points of debate concerning that constitution is whether or not it will contain a "specific reference to God, or to Europe's Christian roots."¹⁰ The consensus points to the latter.¹¹

3. Sara Dillon, *Looking for the Progressive Empire: Where is the European Union's Foreign Policy?*, 19 CONN. J. INT'L L. 275, 276 (2004).

4. *Id.* at 278. Dillon writes:

It seems clear that the decades-old European Community "method"—rational planning, bureaucratic solutions, suppression of political passion and a steady incrementalism—is incapable of catching popular fire in a way that would allow the EU to mount a true global challenge to the U.S. . . . What succeeds for the purpose of internal regulation may fail to achieve external political purposes, since the projection of a strongly held ideal externally relies on the political energy of the true believers.

Id.

5. *Id.* at 286–87.

6. *Id.* at 288 (noting that the EU "can center its new and audacious project around peaceful, negotiated solutions to crises (a grown-up foreign policy)").

7. *Id.* at 286.

8. Dillon notes: "This could be the 'anti-blood and soil' blood and soil." *Id.* at 289.

9. *Id.* at 290.

10. *Christianity Omitted from EU Constitution*, NEWSMAX WIRES, May 29, 2003, at www.newsmax.com (last visited Oct. 10, 2003).

David Brooks, a New York Times columnist, wrote an op-ed piece that seems to reinforce both the association of religion with “blood and soil” narratives, and a severance between these and the “ideal” of the rule of law.¹² In drawing a distinction between President George W. Bush and then-presidential candidate Howard Dean, Brooks suggested that whereas the former “fundamentally sees the war on terror as a moral and ideological confrontation between the forces of democracy and the forces of tyranny,” the latter “fundamentally sees the war on terror as a law and order issue.”¹³ Brooks describes Dean’s view as “idealistic and naïve,” whereas President Bush “at least recognizes the existence of intellectual and cultural conflict [and] acknowledges that different value systems are incompatible.”¹⁴ Brooks seems thereby to indicate that the “incompatibility” of value systems, as well as the “moral and ideological” exceptionalism under which the United States conducts its “war on terror,” involves a concept of religion that is distinct from the rhetoric of “law and order issues.” He quotes Bush saying, “Freedom is the almighty God’s gift to every person That’s what I believe. And the arrest of Saddam Hussein changed the equation in Iraq. Justice was being delivered to a man who defied that gift from the Almighty to the people of Iraq.”¹⁵

Both Brooks and Dillon seem to suggest something limited concerning the rule of law in international relations. Both also seem to highlight not only the exclusion of other narratives—nationalism (blood and soil), ideology, religion—as rules or criteria of legal obligation, but also their effective rhetorical deployment within foreign policy formulations. To the extent that the United States, at least with respect to the present administration, freely employs religious rhetoric and is unapologetic in its moral exceptionalism, it appears to have what the Europeans lack, considering the EU has excluded these discourses from the possibility of formulating a coherent and cohesive foreign policy.

But the EU model is not new; on the contrary, this model of legal exclusion may be disclosed in the founding international legal instruments following the Second World War. As such, what may be perceived as a weakness of the rule of law template within Europe has shown itself to be a weakness of the international legal system as a whole since the 1940s. Brooks decries this weakness and characterizes Howard Dean’s commitment to international law and the resolution of conflicts through multilateral institutions as “naïve,” “idealistic,” and “clueless.”¹⁶ Popular current pronouncements of the “failure,” “collapse,”¹⁷ and “irrelevance”¹⁸ of the

11. *Id.*

12. David Brooks, *Dreams and Glory*, N.Y. TIMES, Dec. 16, 2003, at A35.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 24 (“Although the effort to subject the use of force to the rule of law was the monumental internationalist experiment of the twentieth century, the fact is that that experiment has failed.”); see also *id.* at 30 (“In the winter of 2003, the entire edifice [of

United Nations (UN) also highlight this weakness.

That international law is considered weak, merely aspirational, a “grand experiment,” and indeed, not even really law¹⁹ (or mere policy²⁰), is not new, although the critiques have proliferated as of late.²¹ The reasons are rife, ranging from the preponderance of power politics to the deficiency of enforcement mechanisms.²² But in the story told by Dillon and Brooks, one glimpses something of a paradox: the exclusion of those very narratives that would rescue international law from its status, among the more generous epithets, as “idealistic,” would also challenge its status as law *sensu stricto*. That is, those narratives—religion, ideology, morality, those individuating investments in particular values—are generally placed within the private domain, the *forum conscientia*. What is law is public, rational, universal, and dispassionate.

I suggest that it is at the crux of this paradox wherein lies both the problem (weakness) and the solution, or at least some new way of thinking through the weakness, of international law.

This Article, then, is about the weakness of the rule of law as it faces a world of competing values, morals, and investments. As noted, there are a number of reasons for the weakness or, indeed, the many weaknesses, from conceptualization to enforcement. I shall focus on the paradox of exclusion, and ask: What are the consequences of the creation, within the founding instruments, of a “public” legal domain by the exclusion of religion (in the first instance, and the segregation of morality more generally) to a sepa-

the United Nations Charter and the mandate to maintain international peace and security] came crashing down.”).

18. Felicity Barringer, *Iraq Crisis Casts Doubts on Future Power of U.N.*, N.Y. TIMES, Mar. 9, 2003, at 12 (“‘Relevance’ has become the buzzword of the Iraqi crisis.”).

19. See, e.g., Jack L. Goldsmith and Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 672 (2000) (discussing how modern customary international law is “mostly aspirational” and that states would not follow it if they had pressing military or economic reasons to do so).

20. See, e.g., Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), quoted in José E. Alvarez, Speech at the Canadian Council of International Law (Oct. 17, 2003) (transcript on file with author).

21. Alvarez notes “[t]he impact” that scholars highly critical of international law are having on “U.S. government policy”:

Many of them, including Ruth Wedgwood, John Yoo, and Jack Goldsmith, are being consulted at the highest levels for their views or have been members of the Bush Administration. They have supplied the legal justifications offered for even the most controversial aspects of the Administration’s policies, such as the use of military tribunals or the newly minted doctrine of pre-emptive force. Some of their views, once considered radical within the U.S. legal academy, are now re-emerging within U.S. government briefs before U.S. courts.

Alvarez, *supra* note 20.

22. A case concerning military and paramilitary activities in and against Nicaragua (Nicar. v. U.S., 1986 I.C.J. 14 (June 27)), known simply as the Nicaragua Case, is often cited for this proposition. See, e.g., Shannon A. Wiley, *Fighting Back Against the Taliban: The Case for Restoring Afghan Men and Women’s Right to Self-Determination*, 7 WM. & MARY J. WOMEN & L. 523, 538-40 (2001).

rate, "private" domain?²³ What does it mean that the private domain (for instance, religion) competes with the public domain, even or simply as an alternative rhetoric, thereby rendering the public, rational "rule of law" both idealistic and effete as the primary site of authority?

This Article first suggests that the creation of a public/private divide is founded on an originary exclusion, or series of exclusions (exclusions *seriatim*), that are not merely fortuitous. Second, exclusion functions similarly to what psychoanalysts call "abjection," and we can look by analogy to the nonfortuitous creation of the abject in order to obtain some insights regarding (a) the basis for the exclusion(s), and (b) what happens to the excluded, under modern international law, within the context of the foundational and normative instruments. Third, I posit that the excluded, like the abject, is not only that which the public discourse (the public self) has repudiated and expunged, but also remains latent as a "reservoir of power" and a source of creativity.²⁴ In short, the excluded is a transgressive means of overcoming the self, thereby enabling not the eradication of borders, but the apprehension of their constructed nature and porosity.

Thus, the excluded object (religion) currently functions as an "alternative site of authority" outside the domain of the law that debilitates the law as the primary site of authority. This debilitation cripples the capacity of multilateral institutions to contend with transborder conflicts, which contributes to the development of moral exceptionalism and the triumph of hegemony (and domination) in the wake of September 11th and the Iraq invasion. Nevertheless, I will argue that the excluded also contains important lessons on the overcoming of the will to fixity and purity that the creation of borders of exclusion invariably entails.

23. Os Guinness proposes "three options for the vision of the public square: sacred, naked and civic," in the following:

In many countries in Europe, in the past, the vision of the public square is what is called a sacred public square. In other words, one religion or another was established—Catholicism in some countries, Protestantism in others. Clearly, in an age of extreme pluralism and diversity that is both unjust and unworkable

The other extreme, though, is what has been called the naked public square, where all faiths are rigorously excluded so the public square is secular and all faiths are private. Intriguingly, that is equally unjust and unworkable because it is just a matter of fact in our world today that most human beings are people of some faith or other. . . .

The alternative is the very hard, third way, what is called a [civic] public square. In other words, a public square where people of all faiths have the equal opportunity, based on religious liberty, to enter an engaged public life on the basis of their faith.

Os Guinness, *Living with Our Deepest Differences*, LION & LAMB (Winter 2003), available at www.econline.org/LionLamb/035/differences.html. I suggest that Dr. Guinness's "naked" public square most accurately describes the public international legal space.

24. See L. WILLIAM COUNTRYMAN, *DIRT, GREED & SEX: SEXUAL ETHICS IN THE NEW TESTAMENT AND THEIR IMPLICATIONS FOR TODAY* 17 (1988).

B. Exclusion of Faith as "the Object": A Critique of the Rationalist Paradigm.

God has been banished from the realm of public international legal discourse. Such a statement seems at once unexceptionable and curiously out of place. Why should it matter that public legal discourse, international or otherwise, should be secular? Surely we no longer need a theological language to explain the world's profuse variety of norms, values, morals, confessions, and the ethical impulses and acts attendant upon that profusion. This may surely be true, but despite this multiplicity, there is a "public" legal discourse amongst actors at the international level that attempts to be inclusive, tolerant, abstract, rational, and disinterested. International legal discourse has in effect inherited the rationalism of the Enlightenment project and, to a large extent, it has attempted to repudiate the "blood and soil" narratives that led (and, of course, continue to lead) to so much conflict, death, and depredation.²⁵ In the shadow of a world war in which both sides declared that God was on their side (*Gott mit uns*), the world community banished God altogether from the new rational order.²⁶

God has been relegated to the realm of the private conscience. This banishment, for a myriad of reasons, is benign and salutary. But as an exercise of exclusion toward the creation of a new world paradigm, God's banishment has had a peculiar effect on the "rational" discourse of international law. I wish to suggest in the following an analogy between the exclusion of God or, more broadly, of religion, and the creation of the object for the individual psyche. My first argument, therefore, is that the exclusion of religion and, a fortiori, the marginalization of morality²⁷ under positive international law, may be understood as a form of abjection, whereby the object allows us to see exclusion as both natural (inevitable) and strategic toward the construction of collective identity.

25. See, e.g., Michael Ignatieff, *The Attack on Human Rights*, 80 FOREIGN AFF., Nov./Dec. 2001, at 107.

26. See *id.* The Universal Declaration on Human Rights was not so much a proclamation of the superiority of European civilization as an attempt to salvage the remains of its Enlightenment heritage from the barbarism of a world war just concluded. The declaration was written in full awareness of Auschwitz and dawning awareness of Kolyva

The declaration may still be a child of the Enlightenment, but it was written when faith in the Enlightenment faced its deepest crisis. In this sense, human rights norms are not so much a declaration of the superiority of European civilization as a warning by Europeans that the rest of the world should not reproduce their mistakes. The chief of these was the idolatry of the nation-state, causing individuals to forget the higher law commanding them to disobey unjust orders. *The abandonment of this moral heritage of natural law and the surrender of individualism to collectivism, the drafters believed, led to the catastrophes of Nazi and Stalinist oppression (emphasis added).*

Id.

27. But see Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (2003), for the view that the "moral" rationale is itself the substantive legal authorization, notwithstanding any procedural bar (e.g., the UN Charter), for the use of force.

The abject is a term of art within the psychoanalytical approach to the study of identity.²⁸ Although resorting to analogies between the human body and the collectivity or the state may be problematic, particularly when speaking of the psychological processes involved in the creation of an individual or collective entity,²⁹ the analogy is useful to the extent that it allows us to see what the collective self desires:³⁰ on the one hand, a “universal” self, and on the other, a “particular” self.³¹ All bodies are essentially the same due to their simple humanity.³² At the same time, all bodies are different, and one’s desire for his body is particular to its features.³³ The universal desire, which is a desire for human solidarity, eradicates difference, while the particular desire, which is a desire for individualism, constrains universality.³⁴ The collective self transcends the individual but also is an individual “self” to the extent that the desire is for a particular “body” that represents the ideology, nation, religion—this collective self to which one belongs.³⁵ And what does not belong to me or us is jettisoned as the abject.³⁶

The theory of abjection holds essentially that the self yearns for what Julia Kristeva calls the “*corps propre*”—the self’s “own clean and proper body.”³⁷ In order to attain that body, the self expels its waste.³⁸ However, at the moment of expulsion, the waste is no longer entirely the self since it

28. For a detailed study of the abject, see JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION* (Leon S. Roudiez trans., 1982). See also ALAN HYDE, *BODIES OF LAW* (1997).

29. See HYDE, *supra* note 28, at 215. Hyde discusses how Kristeva’s account of abjection helps to explain the Supreme Court’s use of the human body “as a synecdoche for national identity” in its opinion in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). “Kristeva’s second major illumination [of the case] is the insight into the intimacy, if not identity, of the psychological processes of abjecting waste products and excluding other humans.” *Id.*

30. See *id.* at 252.

Abjection is not just about hatred of immigrants or particular races. It is part of the psychological process of the formation of the self and is particularly associated with the purification of the body and maintenance of body boundaries. Social concern with hygiene is inseparable from division of the population into high and low, and control of the lower orders.

Id.

31. See *id.* at 10–12.

32. See *id.* at 10.

33. See *id.*

34. See *id.* at 11.

35. See *id.*

36. See *id.* at 205.

37. Leon S. Roudiez, *Translator’s Note* to JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION*, at viii (Leon S. Roudiez trans., 1982). Roudiez explains the translation of this phrase:

The French word *propre*, for instance, has kept the meaning of the Latin *proprius* (one’s own, characteristic, proper) and also acquired a new one: clean When I asked Kristeva which meaning she intended the answer was, both. As a result I decided to use the rather cumbersome “one’s own clean and proper body” to render the French *corps propre*, sacrificing elegance for the sake of clarity and fullness of meaning.

Id.

38. KRISTEVA, *supra* note 28, at 2–4.

is being expunged, nor is it yet the other since it is still an attenuated part of the self.³⁹

The abject is not merely expunged from the body: Expulsion is effected by rituals of cleansing and belonging.⁴⁰ Within the primitive conscience, these rituals mark the acclimation of the symbolic—and none more clearly, within the modern context, than the attainment of the law, the *logos* of the I.⁴¹ The abject and the law are thus closely related, largely by their ritualistic, habitual reenactment.⁴² But nothing is predisposed to becoming the abject.⁴³

Michael Ignatieff has suggested that the horrors of World War II, followed swiftly by the beginning of the Cold War, engendered something of a defensive posture—a siege mentality for the world community of states as it conceptualized and formulated international rules of governance.⁴⁴ This mentality provoked a flight not only to a reconstructed, even reconsecrated, Enlightenment project, but also to a version of rationalist individualism unadulterated by the arbitrary and irrational passions of nationalism, ideology, and collectivism.⁴⁵ Within this list one may include religion.⁴⁶ The exclusion of collective identity within the creation of a new (and secular) human rights paradigm required the construction of rigid juridical borders between reason and unreason, and between the rational self and the primitive (collectivist) other.

Antony Anghie reminds us, however, that what is excluded (abjected)

39. See *id.* at 3-4.

40. See HYDE, *supra* note 28, at 219. "[R]ituals of purification 'enact the form of social relations and in giving these relations visible expression they enable people to know their own society. The rituals work upon the body politic through the symbolic medium of the physical body.'" *Id.* (quoting MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* 128 (1966)).

41. See HYDE, *supra* note 28, at 219. "Firm boundaries are part of a characteristically modern narrative of nationality in which 'state sovereignty is fully, flatly, and evenly operative over each square centimetre of a legally demarcated community,' as opposed to earlier imaginings of nationalism in which 'states were defined by centers, borders were porous and indistinct.'" *Id.* (quoting BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 19 (Verso rev. ed., 1991)).

42. See HYDE, *supra* note 28, at 220. "By calling [a social practice] a ritual, I am . . . us[ing] the term as an anthropologist might, to describe social actions that are repeated and integrate the minds and emotions of participants through condensed metaphors." *Id.*

43. See *id.* at 222 (noting that the law is "a discourse that constructs and naturalizes what it claims to find"). Of course, the attainment of law as the symbolic order has a broad and rich history, particularly with respect to the law as instantiation or utterance of "the people" in a moment of self-creation (and thus as the sovereign), and the instantaneous death of God or trauma of the murdered father. For this story as archetype see, e.g., SIGMUND FREUD, *MOSES AND MONOTHEISM* 7-9 (Katherine Jones trans., 1939). One way of understanding the abject is as a performance and expiation of the originary and heroic trauma. Kristeva refers to this as its "jouissance." See KRISTEVA, *supra* note 28, at 8-10.

44. Ignatieff, *supra* note 25, at 107.

45. See *id.*

46. See *id.*

is often at the heart of the *meaning* of the excluding (acting) self.⁴⁷ The abject thus acts as a policing mechanism by creating a border of exclusion.⁴⁸ As such, as I hope to show in the following, religion, though consciously (for largely benign reasons) excluded from the public sphere, reinforces the secular paradigm that legitimates the universalism of the rule of law as a rational, post-Enlightenment discourse. Religion also remains latent as an alternative, extrinsic “site of legitimacy,” both a threat to the system and a reservoir of power and creativity with respect to the rule of law.

Ultimately, to the extent that we conceive of religion as the abject *seriatim*, we might apprehend both the trajectory of moral exceptionalism, unilateralism, and hegemony on the one hand, and the movement of the desire—engendered by the vacuity of a pure, rationalist I (negative liberty, discussed *infra*)—for openness and inclusivity, on the other.

C. Rationalism and Positivist Exclusion

Power’s resort to the rhetoric of religion in a time of crisis is nothing new, but usually has about it a whiff of nostalgia for a sacral or prelapsarian time, when an insecure public and its leaders resolve to put their trust in a Divine Plan or fate.⁴⁹ Certainly, the increasing dependence upon moral arguments, particularly during war, draws attention to the fraught dichotomy and tension within international law between consensualism and naturalism.⁵⁰ Consensualism refers to the concept of law in which states have given consent to be obligated, while naturalism refers to law as “higher” or moral law, and thus is inclusive of nonconsensual normative constraints.⁵¹

While politicians tend to use religious language when discussing the war on terrorism and the war in Iraq,⁵² scholars suggest that under the cover of this moralism, imperialistic motives actually propel U.S. foreign policy.⁵³ If one agrees with Frank Kermode that “the mythology of Empire

47. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 21–22 (1999) (asserting that while society and history became the subject of positivism’s scrutiny and central to its discourse, positivism simultaneously tried to exclude history by “existing in a realm beyond the reach of historical scrutiny”).

48. See *id.*

49. Cf. FRANK KERMODE, *THE SENSE OF AN ENDING: STUDIES IN THE THEORY OF FICTION* 3 (1966) (“‘The artifice of eternity’ is a striking periphrasis for ‘form,’ for the shapes which console the dying generations.”).

50. See, e.g., Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937), in MARK W. JANIS & JOHN E. NOYES, *CASES AND COMMENTARY ON INTERNATIONAL LAW* 137–141 (2d ed. 2001). Consensualism is described as the principle that “states are free to conclude treaties on any subject whatsoever.” *Id.* Natural law is referred to as *ius cogens*, or “compelling norm.” *Id.* at 133, 137.

51. See *id.*

52. See, e.g., Derrick Z. Jackson, *Kerry Finally Has Courage To Take on the Faith Issue*, CHICAGO TRIBUNE, Aug. 2, 2004, at 19; Peter Steinfels, *Beliefs*, N.Y. TIMES, Apr. 5, 2003, at D6.

53. Emily Eakin, *All Roads Lead to D.C.*, N.Y. TIMES, Mar. 31, 2002 (Week in Review), at 4. Eakin states:

and of Apocalypse are very closely related,"⁵⁴ the senescent talk of empire in relation to American military supremacy may in fact be related to the so-called chiliasm of moral discourse at the turn of the millennium. The larger point about the rise of moral discourse in relation to foreign policy and to international law may be that nostalgia and security, and religious faith and moral autonomy, may be more closely related contrapuntally—by a process of authorization and elision—than the rationalist (moral) paradigm suggests.

In the following, I will examine the relationship between theology, moral discourse, and the transnational use of force as a relationship between different and competing sites of authority.⁵⁵ I hope to show that religion continues to play an important role, largely by its prescriptive absence from the legitimating public narrative of international legal norms, and also by its fraught extrajudicial return as a discourse of legitimization both beyond law and within its own terms. The absence of religion within international legal instruments that deal specifically with moral questions may, in the wake of the "mythology of Empire and of Apocalypse"⁵⁶ following September 11th, be a liability in the pursuit of international law as a paradigm of conflict resolution. But it does not have to be. Both law's suppression of morality and morality's repudiation of religion have set up the condition for both the attenuation of the *legal* paradigm and the resurgence of the war paradigm as the means of resolving conflicts and consolidating power. But the turn to religion, as I will try to show, can be a critique of that paradigm.

Modern secular morality, conceptualized within positive international legal instruments (juridical morality, or law's morality), is determined in two ways: It articulates the Enlightenment repudiation of religion (the modernist, positivist element), and it rejects both collective identity and individual identity as in part constituted by its relationship to collective or

Americans are used to being told—typically by resentful foreigners—that they're imperialists. But lately some of the nation's own eminent thinkers are embracing the idea. More astonishing, they are using the term with approval. From the isolationist right to the imperialist-bashing left, a growing number of experts are issuing stirring paeans to American empire.

Id.

54. KERMODE, *supra* note 49, at 10.

55. For competing views of the place of religion in international law, see RELIGION AND INTERNATIONAL LAW (Mark W. Janis & Carolyn Evans eds., 1999); Mark W. Janis, *Has Religion Served as Catalyst or Impediment to International Law?: Religion and International Law*, 87 AM. SOC'Y INT'L L. PROC. 321 (1993) [hereinafter Janis].

[T]he morality of religion has provided some of the glue that has made international law stick. The binding force of any law, international included, cannot rest solely on force. The legitimacy of international law and international organizations ultimately is a function of widespread individual beliefs that the law and its authorities are right and appropriate.

Id. Janis's view is sanguine compared with the realists and consensualists, who believe that the "potential of religious and moral belief for building a sense of international community whereby the peoples of the globe will be concerned with the fate of all the nations, not just their own," runs counter to the self-interest of states and their nationals in relation to power and security. *Id.*

56. KERMODE, *supra* note 49, at 10.

communal identity (the postmodern critique of fascism).⁵⁷ Both determinations are ostensibly a fulfillment of what Hegel calls the "Absolute Mind."⁵⁸ Within that schema, religion is that which the rational mind has overcome.⁵⁹ For Kant, religion informs and inspires, but does not define, the ethical.⁶⁰

Modern morality, particularly as expressed through the doctrines of human rights and of humanitarian intervention, is marked by secularism's "visceral"⁶¹ rejection and exclusion⁶² of religion. Religion's absence from

57. See, e.g., Mark Seem, *Introduction to GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA*, at xvi (Robert Hurley et al. trans., University of Minnesota Press 1983) (1977) ("In confronting and finally overturning the Oedipal rock on which Man has chosen to take his stand, *Anti-Oedipus* comes as a kind of sequel to another similar venture, the attack on Christ, Christianity, and the herd in Nietzsche's *The AntiChrist*."); see also Theodore M. Greene, *Introduction to IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE*, at lxxvii (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1793).

Kant's explicit account of religion is in many ways a typical product of a scientific age and a rationalistic mood. It is an account which harmonizes with an important, perhaps the dominant, aspect of the modern temper; many who read this volume will unquestionably welcome it as giving expression to their own convictions on religion.

Id.

58. Alastair Hannay, *Introduction to SØREN KIERKEGAARD, FEAR AND TREMBLING* 10 (Alastair Hannay trans., Penguin Books 1985) (1843). For Hegel, neither aesthetics (art and beauty) nor religion form

valid routes to knowledge or understanding. The best that either can afford in this respect is a truncated, and in essential ways distorted, vision of the truth. A complete and undistorted vision, or at any rate an adequate grasp of the possibility of such a vision, Hegel calls the Absolute Mind. The Absolute Mind is a rational mind.

Id. at 9–10.

59. See *id.* at 10. "[T]he Hegelian regards religious faith as a provisional state of mind. In order to grasp reality in the manner appropriate to the rational reality it is, one must go further. . . ." *Id.*

60. See, e.g., John R. Silber, *Introduction to IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE*, at lxxx (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1793); Greene, *supra* note 57, at lxxvii. "For despite his opposition to mysticism, [Kant] seems always to have been haunted by a sense of cosmic mystery." *Id.*

61. See JACK MILES, *CHRIST: A CRISIS IN THE LIFE OF GOD* 6 (2001). Miles discusses Nietzsche's reaction to Christianity, the crucifixion, and "the dignification of suffering." He writes: "Nietzsche's visceral reaction, like his visceral anti-Semitism, commonly prompts a visceral counterreaction, but by the visceral intensity on both sides we may measure the power of what he was reacting against in the first place. His reaction was not gratuitous." *Id.*

62. See generally MIROSLAV VOLF, *EXCLUSION AND EMBRACE: A THEOLOGICAL EXPLORATION OF IDENTITY, OTHERNESS, AND RECONCILIATION* 67 (1996). For a "bare-bones sketch of exclusion," I will depend upon Miroslav Volf's definition. *Id.* Volf's conception of exclusion goes further than abjection, to the extent that the abject is more properly defined as the other:

What then is exclusion? In a preliminary and rather schematic way one can point to two interrelated aspects of exclusion, the one that transgresses against "binding" and the other that transgresses against "separating." First, exclusion can entail [the] cutting of the bonds that connect, taking oneself out of the pattern of interdependence and placing oneself in a position of sovereign independence. The other then emerges either as an enemy that must be pushed away from the self and driven out of its space or as a nonentity—a superfluous

public discourse is not without consequences: The two that I address here are the transposition of religious language to secular moral discourse, and the fetishization (atomization) of the individual within both human rights and within the extralegal space or jurisdiction of the moral category. Both elements result in the deployment or exploitation or both deployment and exploitation of the moral category by power (or, within the self-interest of power) as an alternative, extralegal (non-juridical) source of authority. Notwithstanding the important role played by leadership regarding ethical action,⁶³ I suggest that there is a systemized nature to the resort to moral discourse as an alternative to legal legitimacy for the exercise of power. It is this very systematic element of religion that returns to critique the juridically-defined moral category as an extrinsic site as necessarily undermining the legal legitimacy (i.e., multilateral legal institutions) of interstate ethical action.

I should recall at this juncture the point made by Brooks regarding the incompatibility of moral values.⁶⁴ I will tell a story about the clash of moral paradigms within the domestic cultural arena—how the exclusion or suppression of religion in part shapes the moral discourse. The story illustrates the difficulty of bridging the gap between moral values, which Brooks considered to be “incompatible.”⁶⁵ This difficulty or impossibility is a key rationale for the exclusion of religion when the international instruments dealing with moral questions were adopted by the newly-formed United Nations in 1948.⁶⁶ The story also suggests a moral taxonomy that can be applied to the question of morality within international law. I suggest that the taxonomy consists of, at one extreme, a moral clarity, the “terrible purity” suggested in the title, and at the other, moral opacity or humility, the openness toward lived, complex reality, the recognition that identity, whether individual or collective is, in Jacqueline Rose’s term,

being—that can be disregarded and abandoned. Second, exclusion can entail erasure of separation, not recognizing the other as someone who in his or her otherness belongs to the pattern of interdependence. The other then emerges as an inferior being who must either be assimilated by being made like the self or be subjugated to the self. Exclusion takes place when the violence of expulsion, assimilation, or subjugation and the indifference of abandonment replace the dynamics of taking in and keeping out as well as the mutuality of giving and receiving.

Id.

63. See, e.g., Andrew Sullivan, *Victory Is an Article of Faith for Bush*, THE SUNDAY TIMES OF LONDON, Oct. 28, 2001, at 4, available at <http://www.andrewsullivan.com/faith.php?artnum=20011028> (showing George W. Bush’s sense of a religious calling to carry out God’s work in the war against terrorism).

64. Brooks, *supra* note 12, at A35.

65. *Id.*

66. See, e.g., Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 FORDHAM L. REV. 1487, 1498–1503 (2004) (discussing how the drafters of the Universal Declaration of Human Rights attempted to draft a declaration that was universal despite cultural and religious relativism).

"broken."⁶⁷

The second story, in turn, deals with the tension within international law between consensualism and naturalism, or positivism and religion.⁶⁸ I propose to look at the terms of that debate through a theological lens and the exclusionary procedure pursuant thereto, in order to posit what I believe is a consequence of that procedure or praxis: the unilateral consolidation of moral authority by the major powers, or the consolidation of political power through the co-optation of a juridically excluded moral discourse, at the expense of the multilateralist legal system.

The relationship is not static, however, for despite the desire of the (collective) self for fixity (the clean, proper body), identity is complex and the possibility of self-transcendence remains, theoretically at least, latent. The critical point here is that the turn to morality as an extralegal site of authority uncovers the latencies of religion's power and salvific promise. Uncovering the latencies, in turn, reveals, as Gillian Rose has suggested, "the actualities of power and domination."⁶⁹

I.

A. Legal Authority Construed as the Suppression of Religion Within Moral Discourse

The first story of morality (and its exclusions) is that of Harriet McBryde Johnson and her conversation with Peter Singer at Princeton University one day in February 2003. Johnson begins her gripping and complex story with the following words, in reference to her understanding of Singer's philosophy:

He insists he doesn't want to kill me. He simply thinks it would have been better, all things considered, to have given my parents the option of killing the baby I once was, and to let other parents kill similar babies as they come along and thereby avoid the suffering that comes with lives like mine and

67. Jacqueline Rose, *Response to Edward Said*, in EDWARD W. SAID, *FREUD AND THE NON-EUROPEAN* 68 (2003) [hereinafter Rose, *Response to Edward Said*]. "We are talking here not about whole, nor even divided, but something more like *broken* identities." *Id.*

68. See Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1402-03 (2003).

Premised on a centuries-old, Enlightenment compromise that justified reason in the public sphere by allowing deference to religious despotism in the private, human rights law continues to define religion in the twenty-first century as a sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected. Law views religion as natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the "other" of international law.

Today, fundamentalists are taking advantage of this legal tradition.

Id. at 1402.

69. GILLIAN ROSE, *MOURNING BECOMES THE LAW: PHILOSOPHY AND REPRESENTATION* 71 (1996) [hereinafter ROSE]. Rose calls attention to

[A]n account . . . of the modern fate of ethical life: of the institutional and individual inversions of meaning in the modern state and society, where increase in subjective freedom is accompanied by decrease in objective freedom, where the discourses of individual rights distract from the actualities of power and domination.

satisfy the reasonable preferences of parents for a different kind of child. It has nothing to do with me. I should not feel threatened.⁷⁰

Thus begins an examination of the logical consistency which, according to Singer, would require a moral and legal equivalence between abortion and infanticide when the newborn baby is discovered to have irreversible disabilities.⁷¹ Johnson herself was once such a baby some forty years before.⁷² Now, she describes herself as follows: "Much more impressive [than the wheelchair to which she is confined] is the impact on my body of more than four decades of a muscle-wasting disease. At this stage of my life, I'm Karen Carpenter thin, flesh mostly vanished, a jumble of bones in a floppy bag of skin."⁷³

Singer, during one of their exchanges, "lays out" his argument surrounding

[t]he "illogic" of allowing abortion but not infanticide, of allowing withdrawal of life support but not active killing. Applying the basic assumptions of preference utilitarianism, he spins out his bone-chilling argument for letting parents kill disabled babies and replace them with nondisabled babies who have a greater chance at happiness. It is all about allowing as many individuals as possible to fulfill as many of their preferences as possible.⁷⁴

In rebuttal, Johnson, an attorney, notes, "Logical inconsistency is not a sufficient reason to change the law,"⁷⁵ and adds, "As an atheist, I object to his using religious terms ('the doctrine of the sanctity of human life') to characterize his critics."⁷⁶

Within Singer's scientific and logical moral schema, therefore, religion creeps in, albeit by displacement.⁷⁷ But the same applies to Johnson, as she herself discovers when later she reflects upon her day with Singer.⁷⁸

Johnson's story about her encounter with Singer is borne of the hope that her very existence will rebut the pure logic and consistency of Singer's theory. After the last telephone exchange between Johnson and Singer following her day in Princeton, Johnson engages in an imaginary conversa-

Id.

70. Johnson, *supra* note 1, at 50.

71. *Id.* at 53.

[Singer] is a man of unusual gifts, reaching for the heights. He writes that he is trying to create a system of ethics derived from fact and reason, that largely throws off the perspectives of religion, place, family, tribe, community and maybe even species—to "take the point of view of the universe." His is a grand, heroic undertaking.

But like the protagonist in a classical drama, Singer has his flaw. It is his unexamined assumption that disabled people are inherently "worse off," that we "suffer," that we have lesser "prospects of a happy life."

Id. at 78-79.

72. *Id.* at 52.

73. *Id.*

74. *Id.* at 53.

75. *Id.*

76. *Id.*

77. *See id.* at 52-53.

78. *See id.*

tion, with her sister Beth, in which she unfolds this hope. At one point, Beth says that Singer is “advocating genocide.”⁷⁹ This is also the line taken by the disabled persons’ advocacy group, Not Dead Yet, who protested at Princeton when Singer was appointed to the Princeton faculty.⁸⁰ Johnson imagines herself replying to her sister’s pronouncement:

That’s the thing. In his mind, he isn’t. He’s only giving parents a choice.

....

... His motive is to do good.

....

... [H]is talk won’t matter in the end. He won’t succeed in reinventing morality. He stirs the pot, brings things out into the open. But ultimately we’ll make a world that’s fit to live in, a society that has room for all its flawed creatures. History will remember Singer as a curious example of the bizarre things that can happen when paradigms collide.⁸¹

Johnson imagines Beth’s reply:

What if you’re wrong? What if he convinces people that there’s no morally significant difference between a fetus and a newborn, and just as disabled fetuses are routinely aborted now, so disabled babies are routinely killed? Might some future generation take it further than Singer wants to go? Might some say there’s no morally significant line between a newborn and a 3-year-old?⁸²

After some further reflections on the possibility that, without a “bright line” rule to determine who a society can morally kill, a society can indeed be persuaded that the “rational” thing to do would be to “reduc[e] the incidence of disability,” Johnson concludes that even without “empirical evidence” or a “logical argument” to the contrary, she believes it will never come to this.⁸³ She “know[s] it’s happened before, in what was considered the most progressive medical community in the world. But it won’t happen. [She has] to believe that.”⁸⁴

In short, just as a reference to religion had crept into Singer’s narrative by displacement and repudiation, Johnson similarly discovers it within her own moral universe:

Belief. Is that what it comes down to? Am I a person of faith after all? . . . I don’t think so. It’s less about belief, less about hope, than about a practical need for definitions I can live with.⁸⁵

Thus, like Singer, Johnson also distances herself from religion (indexed as belief and faith).

79. *Id.* at 79.

80. *Id.* at 53; see also Johann Hari, *Some People Are More Equal than Others: Peter Singer Is Hailed as the World’s Most Influential Philosopher*, *THE INDEPENDENT*, July 1, 2004, at 2–3 (Diane Coleman, a Not Dead Yet activist, describes Singer as “a public advocate of genocide and the most dangerous man on earth”).

81. Johnson, *supra* note 1, at 79.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Both Johnson and Singer, therefore, repudiate religion or faith as an element of their own moral schema or universe—Johnson by affirming her atheism, and Singer by attributing the religious argument to his critics. Both faith and belief are in a sense juxtaposed against the pure and supposedly amoral logic of consistency on the one hand, and on the “practical” morality of a “need for definitions [we] can live with” on the other.⁸⁶ Both moral universes share a feature that Alistair McFadyen calls the morality of a “pragmatic atheism” that, in its elimination of religion (of “God-talk”), is so axiomatic to modern moral discourse that it appears natural to us.⁸⁷

In the following analysis, I wish to more closely examine McFadyen’s claims regarding the exclusion of religion from the public domain in order to pursue, as it were, its haunt or echo—its latency—beneath and behind what is essentially a secular morality, the modern inheritance of a Kantian “practical” rationalism as exemplified by the hedged, threatened, defensive, and bordered moral posits of both Johnson and Singer. As I suggested above, this rationalist faith, in the wake of the traumas of the world wars, attempts through the construction of borders of exclusion (moral exclusivity) to suture the broken and devastated identity.⁸⁸

B. Law and practical morality

One of the salient aspects of the public discourse of morality in relation to conflict resolution is the frequent reference to evil, true in both the war against terrorism and the war against Iraq.⁸⁹ As the Johnson-Singer story suggests, the relationship between the self and the other can quickly curdle into an intractable good versus evil scenario (Singer as a “baby-killer,” Johnson as a “non-person,” and so on). The elimination of religion from the juridical discourse of morality means, in effect, that the concepts of good and evil have likewise been secularized, in the sense that they are defined by external contingency rather than internal imperative. This essentially describes the difference between secular morality and the doctrine of original sin: that we live “naturally” within a world in which evil is defined by one’s acts, or those of another, rather than one’s being. This

86. See *id.*

87. See ALISTAIR MCFADYEN, *BOUND TO SIN* 6–7 (2000). “The world, at least in its public and material aspects, does not need God in order to understand itself in its own terms. So, why bother to speak of God at all in these contexts?” *Id.* at 7.

88. For trauma, far from generating freedom, openness to others as well as to the divided and unresolved fragments of a self, leads to a very different kind of fragmentation—one which is, in Freud’s own words, “devastating,” and causes identities to batten down, to go exactly the other way: towards dogma, the dangers of coercive and coercing forms of faith.

Rose, *Response to Edward Said*, *supra* note 67, at 75–76.

89. See, e.g., Paul Krugman, *Matters of Emphasis*, N.Y. TIMES, Apr. 29, 2003, at A29 (discussing the media’s role in the Bush Administration’s prevarications with reasons for going to war in Iraq, noting that “it’s true that the war removed an evil tyrant”); see also Sullivan, *supra* note 63, at 4 (discussing Bush’s sense of mission after September 11th: “Look at the language Bush has employed. He uses the word ‘evil’ with constant emphasis. Osama Bin Laden is an ‘evil man,’ the ‘evil one.’”).

also means that we can define the world more easily as good or evil, innocent or guilty.

Stanley Fish describes the difference between “being” and “doing” as philosophical constructs. Thus, “[t]he politics of being is the politics of *faith-thinking* which refuses the lure of plot-thinking, the lure of allowing the accidents of time and history to determine meanings and define obligations.”⁹⁰ Secular morality thus differs from religious morality because it can be described as the ethical interpretation of an act based on habit rather than out of conviction.⁹¹ In Kantian terms, the ethical act is “within the limits of reason alone”⁹² and is not an expression beyond thought itself, characterized as a “politics of first conceiving”—a politics of being itself.⁹³

McFadyen argues that this “flight into the moral” or the “migration of theology” to morality as a private, rather than a public, discourse actually affects the way we see reality and determines our world view.⁹⁴ The rather controversial point here, in short, is that whether or not one believes in God, the absence of God from public discourse and his relegation to the private, subjective, and “irrational”⁹⁵ domain may nevertheless affect one’s apprehension of reality, for morality and religion are ineluctably relational constructs.

Take, for instance, the story of Cain and Abel, which, as Miroslav Volf notes, was “constructed from the start in relation” to each other.⁹⁶ Cain viewed himself as “great in relation to Abel’s ‘nothingness.’ When God pronounced Abel ‘better,’ Cain either had to readjust radically his identity, or eliminate Abel. The act of exclusion has its own ‘good reasons.’”⁹⁷

90. Stanley Fish, *Preface to the Second Edition* of STANLEY FISH, *SURPRISED BY SIN: THE READER IN Paradise Lost*, at lviii (2d ed. 1997). Fish further discusses monism and states: Before you can do right, you must first be right; you must have your eye on the proper object, even if its lineaments are only dimly (through a glass darkly) seen. Centered on an interior disposition, the politics of long joy might also be called the politics of being, the politics which at the moment of choice does not calculate the odds of success or failure, but looks only to a master imperative that has been written on the fleshly tables of the heart.

Id. at lv. Also, “the politics of being,” which follow from monism, “is not quietism. Its relative indifference to outcomes is not an unconcern with the way things go in the world, but a recognition that the turns of fortune and history are not in man’s control and that all one can be responsible for is the firmness of one’s resolve.” *Id.* In sum, “[t]he politics of being is the politics of *first conceiving*, the initial decision to see the world this way rather than that and thereby either think yourself obedient or think yourself impaired.” *Id.* at lvii-lviii.

91. McFADYEN, *supra* note 87, at 8–9. “[T]he atheism of which I speak concerns our operational beliefs; those which we hold in practice.” *Id.* at 9.

92. IMMANUEL KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1793)

93. See Fish, *supra* note 90, at lvii-lviii.

94. See McFADYEN, *supra* note 87, at 19.

95. Sunder, *supra* note 68, at 1402 (“Law views religion as natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the ‘other’ of international law.”).

96. VOLF, *supra* note 62, at 95–96.

97. *Id.*

These themes—the exclusion for “good reasons” of the idea of the collective from the concept of the individual and of religion from the concept of morality; morality’s relegation to the private domain; the abstraction of rights; and finally the theme of a “diremption of law and ethics”⁹⁸—run through the analysis of the consequences of deploying a religious language outside the legitimating parameters of the juridical.

McFadyen relates God, or “God-talk,” to the doctrine of original sin.⁹⁹ He argues that the elision of the doctrine from the pragmatic atheism of modern moral discourse is not only a major development in the history of moral philosophy but also, taking the doctrine at its most stringent, is an elimination of God-talk entirely from how we are enabled, or capacitated, to see the world.¹⁰⁰ McFadyen sets out to show that the “reference to God holds explanatory and descriptive power; that it invokes and enables a more truthful relation to reality in both theory and practice.”¹⁰¹ This argument is no doubt particularly true for those of the faith, but even for atheists there is the haunt or echo of religion. What happens to that haunt within a purified moral discourse (purified, that is, of the “illogic” of belief and faith) is intrinsic to how we see the “messy world of politics, society, and history,”¹⁰² after God.¹⁰³

Relating this observation to the Johnson-Singer story, one can see that the suppression and deflection of the rhetoric of religion is a crucial procedure to effect either the practical morality of rational autonomy and tolerance on the one hand, or logical consistency on the other. The moral universes of both Singer and Johnson, as well as morality more generally in the modern-postmodern era, are pragmatically atheistic and may be threatened, interrupted, or ruptured, by the discourse of religion (i.e., by faith, belief, or that which lies beyond the rational will). Whereupon Johnson’s exclamation: “Belief. Is that what it comes down to?”¹⁰⁴

In all these stories, it is this tenebrous undercurrent that on the one hand leads to the banishment of God, and on the other leads to the accessi-

98. ROSE, *supra* note 69, at 65.

99. MCFADYEN, *supra* note 87, at 9–11; see also MILES, *supra* note 61, at 117 (discussing the “adjustments” in the Old Testament covenant between God and Israel that anticipated—by being conceptually analogous—the new covenant, as written in the Gospels, between God and the world: “What the revision creates, in the end, is a new theodicy, a new way of maintaining that there is still a god and that he still matters in the face of historical experience to the contrary.”).

100. MCFADYEN, *supra* note 87, at 9–11.

101. *Id.* at 10.

102. Anghe, *supra* note 47, at 49. See also *id.* at 24–25, 48–49 for a discussion of how positivist international law (law that is created by human societies and institutions) attempted to bridge the gap between the European and non-European worlds.

103. The story of God’s death within the Western philosophical tradition, coterminous (although not coincident) with the rise of Enlightenment rationalism, is beyond the scope of this Article. Nevertheless, for the complicated end of God’s covenant (as a Divine Warrior) with Israel and of his new covenant (as sacrificial Lamb) with the world through Christ, and the implications of these developments with respect to (a) the demise of the doctrine of sin as necessary to explain the world, and (b) the flight from religion to pragmatic atheism, see MILES, *supra* note 61, at 109–18.

104. Johnson, *supra* note 1, at 79.

bility of the latent irrational (belief, faith, inspiration) as an alternative site of authority and a well or reserve of power and creativity, the promise of a kind of salvific legitimacy beyond the rationalism of the naked public domain.

Now, while this might sound like a query about the success or failure of the secular moral paradigm since the Enlightenment, I want to suggest, in the second story of moral exclusion *infra*, that exclusion as such is essential for the development of juridical morality in two ways: first, in terms of the law's purported inclusiveness and universality,¹⁰⁵ and second, in terms of the ratification, as a consequence, of the Westphalian model, whereby international law is primarily a function of state consent and state recognition of the rules of legal obligation.¹⁰⁶ In short, religion's banishment to the private domain is interesting not simply for its historical implications with respect to moral discourse, but also for its continued interpellation within the modern and postmodern secular understandings of the relationship between morality and law.

International law is a relationship of hierarchies, as Martti Koskeniemi has noted.¹⁰⁷ It is a story of the progressive evolution from the primitivism of "the herd" to the cleanliness of an untrammelled, dispassionate, rational individualism. International law tells a story of progress from religion to secularism, from monism to dualism, from absolutism to relativism, from faith to reason. In short, it tells a story of progress from community to individual. But triumphant liberalism has its price; as Volff suggests, "[t]he undeniable progress of inclusion fed on the persistent practice of exclusion."¹⁰⁸

It seems clear, then, that the excluded, as an alternative site of authority, is exploited by power, fostering the unilateral divagation from the "legitimate" sources of authority within the rationalist public domain. But I have suggested that these extrinsic sites, particularly that of religion, is accessible not only as authority *ex cathedra* (from the mouth of the hegemon), but also may point us in the direction of bridging the gap between apparently irreconcilable or "incompatible" moral universes. It is to this task that I now turn, by looking at the possibilities for reconceptualizing the borders of exclusion.

105. See, e.g., Katherine Topulos, Book Review, 28 INT'L J. LEGAL INFO. 150 (2000) (reviewing CHRISTOPHER R. ROSSI, *BROKEN CHAIN OF BEING: JAMES BROWN SCOTT AND THE ORIGINS OF MODERN INTERNATIONAL LAW* (1998)). "The influence of the concept of the 'universality of law' is most evident in the area of international human rights. The 1948 Universal Declaration on Human Rights was one of the first documents to develop universal legal norms that apply to all nations." *Id.* at 152.

106. For a discussion of the Westphalian model, see, e.g., Philip Chase, Note, *Conflict in the Crimea: An Examination of Ethnic Conflict under the Contemporary Model of Sovereignty* 34 COLUM. J. TRANSNAT'L L. 219, 244-45 (1995); Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT'L L.J. 651, 656-59 (1997).

107. See generally MARTTI KOSKENIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989) (describing the history and current state of international law).

108. VOLFF, *supra* note 62, at 60.

C. Intertext: the Self, the State, and Exclusion as a Strategy

I wish now, then, to link up the public and private discursive domains of morality. The personal question of faith and its elision within a scientific moral vision bears upon and returns us to the conceptualization of the individual self and its relationship to the other. Key to that conception (creation) is the way of seeing as a "way of being" in the world, as suggested by, for instance, Martin Heidegger.¹⁰⁹ If we subscribe to the view that we postmoderns have a penchant, as Michael Lewis suggests, for the authentic as simulacrum,¹¹⁰ including the nostalgic replication of the past rather than the past as scarred, layered, and tenebrous echo,¹¹¹ then it might also be true that how we see informs how we are in an ethical relation to the other. The interpretation and suppression of the echo (God) as irrelevant,¹¹² other, alien, and repugnant—all this, and more—is a consequence of the inherency and naturalness of the exclusionary procedure as axiomatic to modern morality and, as such, to modern subjectivity. As Jack Miles points out, "[t]he divinization of the victim is the wellspring of revolution, even as the demonization of the victim is the wellspring of

109. MARTIN HEIDEGGER, *BEING AND TIME: A TRANSLATION OF SEIN UND ZEIT* (Joan Stambaugh trans., State University of New York Press 1996) (1953). Heidegger explores the varied and complex relationship between seeing, knowing, and being, common to the aesthetic tradition, as in the following passage: "The *logos* of the phenomenology of *Da-sein* has the character of *hermeneuein*, through which the proper meaning of being and the basic structures of the very being of *Da-sein* are *made known* to the understanding of being that belongs to *Da-sein* itself." *Id.* at 33. See also the relationship between being and seeing within the Greek word *eidenai* (to know, to see). *Id.*, at 171160.

110. Michael J. Lewis, *It Depends on How You Define "Real,"* N.Y. TIMES, June 23, 2002 (Week in Review), at 3 (suggesting that we crave the authentic, but "of the virtual sort: graphic and visual, providing the image of the thing without the substance").

111. See *id.* (discussing the craze to build replicas of ruined buildings, such as the Frauenkirche in Dresden, Germany). By replacing the real thing with a perfect replica, we

lose the tragic and mortal thing that is the building itself, the physical object that has journeyed across time, and whose roster of scars and alterations represents the most fragile aspect of a historic artifact: the sense of congealed time Such a recreated design might be like the genetic clone of a dear friend—identical in every respect but that of shared experience, and therefore a stranger.

Id.

112. Jack Miles's quote from Nietzsche's *The Anti-Christ* provides an example of the suppression of god as alien and repugnant:

What is good? Everything that heightens the feeling of power in man, the will to power, power itself.

What is bad? Everything that is born of weakness.

What is happiness? The feeling that power is growing, that resistance is overcome.

Not contentedness but more power; not peace but war; not virtue but fitness (Renaissance virtue, *virtù*, virtue unadulterated by morality).

The weak and the failures shall perish: first principle of our love of man. And they shall even be given every possible assistance.

What is more harmful than any vice? Active pity for all the failures and all the weak: Christianity.

repression."¹¹³

Thus, relating the personal or individual moral universes of Johnson and Singer to the public domain alluded to within that story—particularly the fear, on the one hand, or the hope, on the other, that the state will be prevailed upon to change the inconsistent laws regarding abortion, infanticide and euthanasia to conform to the “terrible purity” of one moral vision rather than another—I suggest that the same collision of moral paradigms may occur within the state. According to Hegel, “[t]he State in and by itself is the ethical whole.”¹¹⁴ There is the same potential for an enervation of the capacity of the communal (state, nation, collective) self and other to relate, ethically, beyond the purity and terror of a moral exceptionalism.

And yet, the strongest arguments advanced for the exclusion of religion suggest that the possibility of exceptionalism is merely theoretical and is influenced more by power politics run amok or the illogical and counter-productive strategy of power than by an underwriting logic inherent within the exclusionary procedure. I suggest that Iraq proves quite the contrary and shows that it is how power perceives and utilizes its moral authority that determines the potential for the self-view as exceptional and above the law.¹¹⁵

Since Iraq, the discourses of morality and of religion have been concomitant with the sudden clarification of power’s tendency toward this exclusivity, exceptionalism, and imposition. Some scholars, including Michael Byers, suggest that the United States’s position vis-à-vis international law is highly strategic and far from being quixotic.¹¹⁶ The question

MILES, *supra* note 61, at 6 (emphases in original).

113. *Id.* at 7.

114. Hannay, *supra* note 58, at 29 (quoting HEGEL, *PHILOSOPHY OF RIGHT* 279 (T.M. Knox trans., Oxford University Press 1980) (1952)). Hannay continues: “This is precisely the idea of the ethical as the universal which [Kierkegaard’s] *problemata* present as a hoop that Abraham must jump through in order to prove the morality of his action. Abraham consistently fails.” *Id.* at 30.

115. Although the argument regarding moral exceptionalism is kept at a general level, it is nevertheless truer of the United States as a superpower than it is of other major powers. See, e.g., Mark Leonard, *Euro Space: A State of Mind: Combine and Conquer*, WIREd, June 2003, at 132.

The bureaucrats in Brussels have been busy creating a new political space that has the power to make the 21st century the European century. The EU’s geographical expansion to 25 countries, which will grow to include a dozen smaller ones and maybe even Russia, is nothing compared with its increasing *legal and moral reach*.

Id. (emphasis added). Leonard notes three ways the EU expands its political space: by stealth, through diversity, and by “syndicat[ing]” its legislation and values.” *Id.* The third, the coterminous expansion of political and moral spaces, is of particular concern in this essay.

116. Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 173 (2003) (suggesting that after September 11th, the United States, like other powerful states before it, has been trying to reshape international law to its advantage). “The focus on securing generally applicable changes indicates a deliberate, strategic approach to lawmaking by the single superpower, and thus an acknowledgment of the continuing resilience and relevance of international law.” *Id.*

is how these movements with respect to law (international legitimacy), power, moral discourse, and moral exceptionalism are related. I first examine the specific elimination of God from morality in the first instance and morality from the law in the second. Second, I suggest that the secular paradigm as an international juridical morality reflects the banality of rationalism. The turn to rationalism is marked by the same elements and is driven by similar reasons (i.e., empire, hegemony) as the turn to positivism within the nineteenth century.

D. Morality and Positivism

What is the consequence of the Kantian development of moral autonomy, as the individual's independence and escape, in essence, from God? For Kant, as for Hegel, religion (and faith more particularly) is "a children's disease which one must hope to get over as soon as possible."¹¹⁷

McFadyen attempts to determine the effect of the absence of God from public discourses, such as those disciplines concerning pathologies (e.g., sociology, psychology).¹¹⁸ He examines the Holocaust and the instance of sexual abuse of children as two examples of pathologies that are fully explainable by reference to scientific, rational, and secular discourses.¹¹⁹ But his larger point—that God has been relegated to the private dimension and is "admitted into the 'gaps' left where the explanatory power of secular discourses gives out"¹²⁰—is apposite to the analysis of modern moral explanatory devices. It is also true for the Hegelian analysis of faith.¹²¹ Within these modern, secular discourses, talk of God and indeed of sin¹²²

117. Hannay, *supra* note 58, at 12 ("[W]e are led by Hegelian philosophy to suppose that . . . the faith Abraham bore witness to is to be treated as though it were 'a children's disease which one must hope to get over as soon as possible.'"); see also Greene, *supra* note 57, at lxxvi-lxxvii.

We must conclude, then, that Kant's explicit account of religion is in many ways a typical product of a scientific age and a rationalistic mood. It is an account which harmonizes with an important, perhaps the dominant, aspect of the modern temper; many who read this volume will unquestionably welcome it as giving expression to their own convictions on religion. If this is true, the *Religion* . . . is . . . a deistic classic.

Id. at lxxvii.

118. McFADYEN, *supra* note 87, at 43-54.

119. *Id.* at 47-48.

120. *Id.* at 7.

Is God-talk only possible by distancing God from the world, by making God utterly transcendent and 'other' to it, whilst permitting a compensatory proximity in the subjective dimension of moral and spiritual values? If so, then God-talk is redundant to the task of understanding and living in the world The world, at least in its public and material aspects, does not need God in order to understand itself in its own terms.

Id.

121. See Hannay, *supra* note 58, at 10-11.

122. See, e.g., McFADYEN, *supra* note 87, at 4-5. "Speaking of God and world (in its pathological aspects) together is the core function of the language of sin. For sin is an essentially relational language, speaking of pathology with an inbuilt and at least implicit reference to our relation to God." *Id.* at 4. Furthermore, "[i]t is of the essence of sin-talk, therefore, that it should function as a *theological* language, and this is the source

is irrelevant to “the frameworks through which we understand the world by disciplined attentiveness to it in its phenomenal integrity.”¹²³

The exclusion of God is, in effect, “a performance of atheism,” one “mediated, not so much by argued or reasoned conviction, as by basic and habitual *practice*. Atheism is something that we all *live out and enact* in the public world, even if we refuse to give it consent in the form of explicit beliefs.”¹²⁴ Thus, McFadyen holds that “[i]t is our incorporation into this practical atheism which explains how it is that many will be bemused by the claim that the doctrine of sin holds, not just meaning, but explanatory power for us today,”¹²⁵ and thus could be more than merely a “rhetorical flourish.”¹²⁶ And yet it is precisely because modern secular morality is a function of habit—that its apparent “rationality” is in essence unwilled and uncritical—rather than a matter of conviction, that the rhetoric or haunt of religion maintains an irruptive hold on the modern secular moral mind,¹²⁷ latent as a threat or promise.

McFadyen, therefore, proposes a “conversation” between theology and morality, which attempts not an erasure of one by the other, but rather a supplementation, whereupon a “minimum requirement . . . is refusing to give up on an effective reference to God; resisting the urge to translation of theological into secular and pragmatically atheist categories.”¹²⁸ I under-

of its distinctiveness from and irreducibility to other languages through which the pathological may be discerned and described.” *Id.* at 5.

123. *Id.* at 8.

124. *Id.* at 8–9.

125. *Id.* at 9.

126. *Id.* at 10. “Where the terminology of sin remains in public use, it tends either to be trivialized or deployed as an emotive device for passing judgment and attaching blame.” *Id.* McFadyen also explains that the doctrine of original sin is antithetical, even offensive, to modern morality. *Id.* at 22–23. Morality as prior to sin means sin is defined by acts. See *id.* at 25–26. The individual (subject) is autonomous and independent of all external relations. *Id.* The criteria for determining sin is subjective. *Id.* at 26. Sin as *prior to* (and independent of) morality, on the other hand, “appears to work with an entirely objective notion of legal or moral offence, paying no regard to the subjective nature of action which ‘natural’ morality takes to be an essential correlate of guilt.” *Id.* at 27.

127. *Id.* at 11.

It must be admitted from the outset that, if God-talk merely appends itself to an analysis already in place, then renaming as sin that which secular thought identifies as pathological is no more than a rhetorical flourish. It adds precisely nothing at the level of explanation and understanding to baptise and bless conclusions arrived at by secular means for secular reasons. Only if Christian faith possesses a specifically theological understanding of what sin is and how it functions might it have something to offer secular diagnosis and therapy.

Id. What is also implicit in McFadyen’s analysis is true of Kierkegaard’s suggestion of two kinds or meanings attributed to “faith.” On the one hand is the “Hegelian notion of faith,” in which “habit” conforms to a “cheapened conception of faith,” whereby faith is “the beginning and not the end” of one’s undertaking. See Hannay, *supra* note 58, at 12. On the other hand, faith as “the end” conforms with McFadyen’s notion of conviction, the sacrifice of self that is required in quest of the Abrahamic faith as “an expression rather of the limit of what can be thought.” *Id.* at 11.

128. MCFADYEN, *supra* note 87, at 13. Further,

[i]f God is the most basic reality and explanation of the world, then it must be the case that the world cannot *adequately* be explained, understood, lived in,

stand this to mean that I as the self do not lose myself when I relinquish control and recognize that the borders separating the rational from the irrational and absurd are porous.

Is this possible? Whither control, identity, and the clean and proper body? This is a revolutionary call, for the appeal of rational secularism, not to mention the freedom it projects, is very real, as are the fear of and prejudice against religion's call to structured and often discriminatory ways of being in the world, especially in its fundamentalist cast. Jacqueline Rose calls this the "coercive and coercing forms of faith"¹²⁹—e.g., the fundamentalists' strict application of Shariah, or condemnation of homosexuality, the right to choose, and so on. But for those of the faith, secularism's preclusion of a sacred space is also feared. Furthermore, we must translate McFadyen's call from the individual to the collective level, from the autonomous self to the self as state. If nothing else, exposing both states and individuals to that which they have excluded and repressed—that which functions as the "antithesis" of legal authority and state-defined legitimacy—in furtherance not only of tolerance but also of power may "throw into sharp relief the basic beliefs and assumptions concerning human beings and the human situation that shape the way we habitually construe and deal with the pathological in human affairs."¹³⁰

How can the conversation between the secular and religion take place, and how can the law (as the public domain or discourse) act as a bridge or a space within which to harbor that interaction? How can the law function as the "civic" space between naked and sacred spaces, predicated on exclusion? Slavoj Žižek's turn to theology may be seen as just such an attempted conversation.¹³¹ Žižek attempts this political dialogue between Marxism and a Christian faith "extracted from its 'religious' trappings."¹³² For Žižek,

the concept of sin—the estrangement between us and God—must be understood as an illusion in order for us to reclaim personal agency. Bridging this chasm, "the law"—a term central to both Judaism and Lacanian psychology—is arduous, demanding and reparative. Particularly in its Jewish form, the law mandates a social solidarity that points to messianic reconciliation and justice.¹³³

without reference to God in our fundamental means both of discernment and of action. That is a far cry from suggesting that secular disciplines of discernment, interpretation and action are worthless and may comprehensively be replaced by theology. But it is to suggest the inadequacy of merely sticking God on to secular talk at the last or the first moments, but disallowing it to function in between, an effective bracketing-out of God from the secular picture of the world, which fails in the end to relate the world to God.

Id. at 12.

129. *Response to Edward Said*, *supra* note 67, at 76.

130. McFADYEN, *supra* note 87, at 14.

131. See Eugene McCarraher, *A Merry Marxy Christmas*, IN THESE TIMES, Dec. 23, 2003, at http://www.inthesetimes.com/site/main/article/a_merry_marxy_christmas (last visited Nov. 5, 2004).

132. *Id.*

133. *Id.*

Thus, for Žižek, “redemption is not rejection of the law but rather the end of that condition in which ‘the subject experiences its relationship to the law as that of subjection.’”¹³⁴

However, as Eugene McCarragher points out, Žižek’s Pauline theology collapses because, to put it squarely, it does not assert the exterior reality of God, on which Christian joy and political commitment must inevitably rest. However empowering Žižek’s formulation seems, it rests on an interiorized—and, Christians must maintain, ultimately empty—space through which we end up pursuing our own shadows.¹³⁵

In short, secularism “must engage [Christianity’s] religious form.”¹³⁶

The conversation between secularism and religion, where the former has “viscerally” repudiated or suppressed the latter, will be equally complex and difficult. An element of the repression, albeit for what appear to be pragmatic reasons, is indexed in the conception of modern international law and its response to large-scale pathology. Religion’s suppression thus constructs the law without the salvific self-desire (desire of the self for the law) suggested by Žižek. Another way of contrasting the secular and religious conceptions of faith is to view faith as a means, as the “beginning” of thought, leading to a *logos* void of *pathos* (e.g., Dillon’s “[legal] incrementalism”). On the other hand, faith as the end or *telos* (in Kierkegaard’s formulation, the “teleological suspension of the ethical”)¹³⁷ leads to *logos* as self-transcendence, i.e., *logos* that recognizes the incommensurability of power and the danger of *pathos*. This is the content of Kierkegaard’s discussion of Abraham’s act of faith in being willing to sacrifice Isaac.¹³⁸ Modern international law (including modern juridical morality), which is founded upon a rational repudiation of the absurd (or the rationalist rejection of Abrahamic faith), is thereby eviscerated in its attempt to explain the pathology (pathogenesis) of intrastate conflict.

This, then, is an exploration of the tension between religion and secularism as seen through a theological lens. I return to this frame, in discussing the fertility of the abject (faith, religion) in the movement from exclusion to embrace. But the tension between secular rationalism and faith can be articulated within a positivist legal framework. I will explore, then, the ethical, pathogenic, and functional borders of exclusion within the legal framework.

The pathological, in Mark Weisburd’s example, is the Kosovo conflict, which was resolved in 1999 by a North Atlantic Treaty Organisation (NATO) bombing campaign against the then Federal Republic of Yugoslavia.¹³⁹ Weisburd casts the tension within international law concerning the

134. *Id.*

135. *Id.*

136. *Id.*

137. SØREN KIERKEGAARD, *FEAR AND TREMBLING* 53–67 (Alastair Hannay trans., Penguin Books 1985) (1843).

138. *Id.*

139. See A. Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT’L L. 225, 231–32 (2001).

use of force to intervene in the internal affairs of a sovereign state as one between consensualism-positivism (positive law as well as customary law) and naturalism (law that is beyond and a priori state consent, so-called "higher" or moral law).¹⁴⁰ The positivist view would preclude the formulation of any legal rule that would obligate states, without their consent, to intervene in response to "massive evil."¹⁴¹ Law, according to the consensualist view, is strictly a matter of state consent, and unless moral imperatives are reduced either to positive expression or collectively agreed upon as sufficient state practice (custom) requisite to the introduction of new norms, the moral imperative, such as humanitarian intervention contrary to positive law, would not have the force of a new rule of law.¹⁴²

The argument in favor of positivism and against the introduction within international law of "natural law" theories has recently centered on the doctrine of humanitarian intervention¹⁴³ as either an evolution of international law or an exception to the UN Charter's general prohibition against the use of force. A state may, for moral reasons, intervene in another state's domestic affairs to save that nation's civilians from the violation of their human rights by their own government.¹⁴⁴ The intervening state is acting according to "natural law," but without an invitation the ethical act is contrary to the laws and norms governing the use of force under Article 2(4) of the UN Charter.¹⁴⁵ Positivists suggest that humanitarianism, as with all natural law within the context of international law, should only become part of the law (*lex lata*) under the stringent requirement of state consent.¹⁴⁶

As Weisburd explains, "such legalization would be a mistake"¹⁴⁷ without express state consent. While international responses to humanitarian crises are sometimes appropriate, human rights violations are so substantially different from one another that legal rules would be inadequate in dealing with state responses or attempts to hold perpetrators accountable.¹⁴⁸ Thus, these difficulties "are so great that it would appear that the preference for international approaches is more of a faith-based conviction than a conclusion based on sober analyses of the legalities of the matter

140. See *id.* at 240-41.

141. *Id.* at 230; see also Anghie, *supra* note 47, at 10-22 (discussing the development of positivism and outlining its jurisprudence).

142. See Weisburd, *supra* note 139, at 230; Anghie, *supra* note 47, at 10-22.

143. See, e.g., David Rieff, *Humanitarianism in Crisis*, 81 FOREIGN AFF., Nov./Dec. 2002, at 111.

144. See *id.* at 113-14; see also Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31, 41-42 (2002) (discussing moral justifications for humanitarian intervention).

145. See U.N. CHARTER art. 2, para. 4. This article reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" *Id.*

146. See, e.g., Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 204 (1992); Weisburd, *supra* note 139, at 230.

147. Weisburd, *supra* note 139, at 230.

148. *Id.*

and of the policy dilemmas such situations present."¹⁴⁹

The opposition between "faith" and "analysis" is necessary for Weisburd and the positivists to maintain the process of exclusion whereby, as with Singer and Johnson, the positivist displaces the religious argument upon his (naturalist) critics and excludes it from the normative schema of his legal universe. Consensualism, under this interpretation of humanitarianism and morality, is a function of pragmatism in which "faith" has no relevance. Regardless of the consequences of excluding faith or conviction from the legal discussion regarding the internationalization of norms (i.e., the positive reduction of *moral* norms to *legal* obligation to intervene), the discursive elision returns the state to central arbiter of what constitutes the law and, as such, the moral. The state is in absolute control, requisite to the conception of rationalism as "sober analysis." Elision vests authority in the state to decide not simply what moral values to uphold and legislate, but also with respect to what constitutes per se the category of the moral.¹⁵⁰

Regarding the specific issue of Kosovo, Weisburd reviews the positions of a number of commentators, both positivists and naturalists, regarding the legality and legitimacy of the NATO bombing of Kosovo and Serbia.¹⁵¹ Many suggest that although intervention was illegal at the time because it had not been authorized by the Security Council, the Security Council in effect adopted a new humanitarian exception to the general condemnation of the use of force under the UN Charter¹⁵² by rejecting a Russian resolution that was offered shortly after the campaign commenced which condemned the bombing.¹⁵³

Weisburd argues that no such exception exists or should exist on the basis of limited state practice.¹⁵⁴ He suggests that no such international legal obligation is required; in the cases in which the international community has intervened on humanitarian grounds notwithstanding the Security Council, intervention has invariably taken the form of a regional response.¹⁵⁵ Moreover, a change in law permitting intervention is not even needed because "[a]ny violation of human rights massive enough to trigger calls for intervention is likely to be characterized as a threat to international peace and security," which would permit the Security Council to take appropriate action in response.¹⁵⁶

149. *Id.* at 230.

150. That is, morality as the rational discourse of states *inter se*.

151. Weisburd, *supra* note 139, at 233-37.

152. U.N. CHARTER arts. 2(4), 39-51.

153. Weisburd, *supra* note 139, at 232-33.

154. *Id.* at 239-41.

155. *Id.* at 235 (describing Greenwood's brief mention of intervention in Liberia by the Economic Community of West African States (ECOWAS) and in Iraq as two instances in which intervention was not authorized by the Security Council).

156. *Id.* at 272. Weisburd continues:

Conversely, if the Security Council were to conclude that an ostensibly humanitarian intervention was nonetheless a violation of the Charter, that determination would presumably be conclusive, notwithstanding any claims intervenors

Weisburd is therefore surprised at the resilience of naturalist arguments in the face of positive international law.¹⁵⁷ After examining the body of international human rights norms vindicated by humanitarian intervention and the Rome Statute inaugurating the International Criminal Court, Weisburd asserts that "both the philosophical and legal bases of claims for the universality of the values embodied in international human rights rules seem uncertain. It remains undetermined why respected scholars nonetheless insist on the validity of their philosophical and legal positions regarding rights."¹⁵⁸

In critiquing Professors Franck and Henkin's reliance on natural law and Professor Reisman's reference to "trans-empirical sources of law,"¹⁵⁹ Weisburd makes a number of assumptions that permit him to dismiss naturalism as having salience in international governance.¹⁶⁰ However, Weisburd really contests the religious or theological element of naturalism, which is embedded in the claim to universality of prescribed norms and includes the primacy of human rights norms even over religion.¹⁶¹ Sovereign equality, for instance, only has value as an international law norm if states agree to it. Their very agreement makes it a universal but contingent value. It does not have any intrinsic value as a universal and transhistorical norm.¹⁶² Weisburd's attempt to expunge natural law from positive law, and any moral claims therein, is thereby a cleansing of law of any but contingent value.

The attempt to abject, so to speak, the "matter of faith" (now transmuted from religion to human rights norms), as a rule or criterion of decision, creates a border of exclusion not only between *logos* and *pathos*, but also between paradigms of universal value. Weisburd's purification is true to both the positivist (state-centric) and rationalist (Kantian) heritage. Even his interpretation of natural law is post-religious. And therein lies the

might make regarding their duties under international law. Any other conclusion seems impossible to square with the Charter.

Id. at 272-73.

157. *Id.* at 271.

158. *Id.*

159. *Id.* at 274.

160. *Id.* at 274-80.

161. *Id.* at 274. Weisburd characterizes Franck, Henkin, and Reisman's position "as a matter of faith." *Id.* He goes further and directly contends with religion:

Perhaps it is some notion that human rights principles are a sort of revealed truth that explains the willingness of supporters of these principles to insist on their primacy over all other principles whatsoever, including those of religion. . . .

But if what we are encountering is something akin to a religious faith argued to be a source of law, it seems reasonable to inquire who the interpreters of this faith are . . . [T]he relevant views seem to be those of international lawyers and nongovernmental organizations (NGOs)

Id. at 275.

162. This is in stark contrast to Weisburd's characterization of naturalist theory: "At least implicitly, [naturalism] rejects any suggestion that law is a social institution created by human beings, and argues instead that human beings are legally obliged to obey rules that they did not create and cannot alter." *Id.* at 274.

rub, for Weisburd's schema harbors and is founded upon a continuum of borders, an ontology of exclusion, segregation, and hierarchy. This is the crux of both positivist and a pure Kantian rationalism, tending increasingly toward exceptionalism and atomization.

But notwithstanding the stringent purification by positive law of the universal-as-postrational (i.e., as faith) at the heart of a juridically externalized morality (new moralism) in international legal and political discourses, there is an ambiguity concerning the idea of freedom (free will): On the one hand, the state's will to consent is unfettered, and on the other it is constrained. This can also be characterized as two different strains of morality, or moral doctrine. Borrowing once more from McFadyen, we see that on the one hand, the secular language of morality holds, as a "basic axiom of modernity," the "primacy and inalienability of freedom, defined as freedom from determining influence and so founded on an ontology of separation."¹⁶³ By contrast, a conceptualization of sin, and by extension, morality as a theological language, posits "an unavoidable reality conditioning and shaping freedom."¹⁶⁴

Thus, the banishment of God—by suppressing religion within a secular norm, which in turn is suppressed by a positive rule—does nothing to prevent the return of God, and meanwhile creates an ontology of exclusion with its implication of exclusivity/exceptionalism. Consequently, the universal as contingent becomes self-contradictory. This formula can be described in socioanalytical terms: The tension between conceptions of freedom, and as such of (and within) the moral self, leads to conflicting normative posits pursuant to the creation of international norms through both domestic conduct and international response (i.e., the construction of the juridical self). The tension within moral discourse, therefore, constrains the claim to universality of that discourse; it constitutes or polices the possibility of dialogue between the juridical self and her other. Understanding of the self as a moral articulation, or moral project—her self-perceptions, deployments (violent and otherwise), strategies of accountability, and doubt—must also elucidate the legal and political relationship between the self and the world. In short, an ethics of the self is crucial to understanding, at the normative level, the various ways we talk about American power and implications of its global projection. Weisburd's positivist elision thus implicates both individual and state self-constructions and projections.

Recalling the discussion of how the world is shaped and molded by one's perceptions and representations, the radically contingent view of the world posited by positivism should mean that the beyond of the juridical self—the world of the private, moral, incontestable, and irrational—ceases to exist as a *juridically legitimated reality* at the behest of the self, or at the very least is diminished in its relation to the self.¹⁶⁵ This is one important

163. McFADYEN, *supra* note 87, at 108.

164. *Id.*

165. Weisburd presupposes that in any given case there will be differing values and competing interpretations, such that a single international standard or value would be

corollary to the delimitation of the universal as a non-contingent category (the non-existence of an overarching reality) within the relations between self and other.

I would hazard this argument regarding the allocation of normative value between contingency or universality precisely because even if positivism and consensualism laid claim to nothing beyond the state's will or the state's power, the claim to universality is itself an essential argument for the institutionalization of those values prescribed by the state—e.g., the universality of sovereign equality—even if this claim is merely rhetorical.

Universality, at least with respect to sovereign equality, is an incapable ingredient of a state's claim to legitimacy and authority. But, as I have argued, so is the attempt to suppress its moral association or source through exclusionary procedures, of which Weisburd's argument in support of a cleansed positive international law is exemplary. The attempt to expunge universality as merely adjunct to naturalist theories of law is self-contradictory but suggests the deeper logic involved in the argument for a state's right to claim sole arbitral status to determine legitimacy and authority. That is, what often escapes notice is the extent to which the suppression of naturalism—synonymous, for our purposes, with modern secular morality—functions as a procedure of exclusion that shapes the discourse of positive law and in turn vests the state with authority and unfettered discretion, just as morality is defined by the repudiation and erasure of God.¹⁶⁶

Nevertheless, within public discourse, and outside the parameters of the rule of law *sensu stricto*, political leaders resort with alacrity to religious and moral references during times of war. My third story, then, concerns the exploitation of the moral category, safely ensconced outside the *positive* authoritative source of law. I have suggested that moral exceptionalism and exploitation undermine the rule of law. This is true, but it is not the whole story. Thus, my third story illustrates how religion functions as a critique of positivism through the transmigration of religion within the

an imposition by international lawyers as "philosopher-kings, entitled to rule simply by virtue of their wisdom." Weisburd, *supra* note 139, at 279. Because there are serious problems with implementing international institutions that either compete with or take insufficient account of local values, such as the Rwanda tribunal, Weisburd argues that disagreement and difficulty, not to mention the specter of imperialist imposition of one value system over another, should themselves moot the possibility for the existence of universal values. See *id.*

166. It should be noted that I use the word "repudiation" to represent the extent to which God, religion more generally, and faith are rejected by secular moral discourse as a source of explanatory and descriptive power. The elision of religion is often characterized, however, as the protection of confessional freedom, thereby requiring that moral language be secular. See, e.g., David Little, *Religion—Catalyst or Impediment to International Law?: The Case of Hugo Grotius*, 87 AM. SOC'Y INT'L L. PROC. 322, 322-23 (1993). The Universal Declaration of Human Rights is "a common standard of achievement for all peoples and all nations," and as such "it follows that human rights would have to be secular, at least in the sense of excluding religious identity as a criterion for citizenship." *Id.* at 323. Thus, the Declaration drafters "after considerable controversy, deliberately refrained from including references to a deity or to the immortal destiny of human beings." *Id.*

positive legal instrumentalities. Here, I will analyze the relationship between (1) morality as a public discourse outside the law, (2) morality as defined within the parameters of the law as secular and only that to which states have consented (for instance, the moral dimension of the UN Charter), and (3) the gap that this moral calibration has created, permitting both exploitation of legitimacy and critique of state power.

E. Transmigration (or, the Immanence of Religion)

The exclusion of religion ratifies and undermines the rule of law. The transmigratory return of religion critiques the exclusionary praxis that ratifies and undermines the rule of law. One must look closely, then, at this transmigration of religion.

In Weisburd's elimination of morality in its natural law (and postreligious) construction from the parameters of positive and customary law under the theory of consensualism, an interesting thing occurs: As José Alvarez says,

International lawyers share an appealing evangelistic, even messianic, agenda. We are on a mission to improve the human condition. For many, perhaps most of us, this mission requires preferring the international "over the national, integration over sovereignty." Multilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the U.N.¹⁶⁷

Weisburd reiterates the point that "international lawyers' insistence on the legal character of human rights principles is best understood as akin to religious faith"¹⁶⁸

My first point, then, is that the evacuation of religion from morality within the juridical space, which McFadyen describes as the flight from religion of modern secular morality,¹⁶⁹ engenders an immanence of religion within that space. Secondly, the religiosity of international law's moral dimension is corollary to the yearning for law as the repository of fixity (control, borders) and purity. The abjection of religion should lead to the "clean and proper body" free of the burdens and superstitions of faith. Instead, faith returns as a continuing fertile source of moral legitimacy and, bled of its religious specificity (e.g., as the human rights or humanitarian impulse), takes on this pallid, secular reflection ("worship at the shrine of . . . the UN"¹⁷⁰; human rights as "akin to religious faith,"¹⁷¹ etc.). Morality as such and its ancillary religious language remains the "passion" to law's "reason."

When reviewing Alfred Rubin's book in defense of positivism, Iain Scobbie notes that it is a valuable "reinstatement of authority as a central

167. Weisburd, *supra* note 139, at 279 (quoting José Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393 (2000)).

168. *Id.*

169. McFADYEN, *supra* note 87, at 19.

170. Weisburd, *supra* note 139, at 279 (quoting José Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393 (2000)).

171. *Id.*

concern" because it "insist[s] that a clear distinction should be drawn between law as it is and law as it ought to be, thus 'differentiating moral indignation from legal argumentation.'"¹⁷² Scobbie also cites Rubin for the pure contingency theory of law, which posits law as "a contingent social institution, 'an aspect of social perception, reflecting morality, political values and traditions that vary with time and in place.'"¹⁷³

In other words, in order to cure international lawyers of an associative complicity with religion, authority and legitimacy must be reasserted and reemphasized as deriving from the state and not from beyond the state. Also, positivism must aim to cure international law of the "residual inarticulate naturalism of the invisible academy of international lawyers."¹⁷⁴

Thus, we might see the return and imminence of a transmigrated (transmuted) religiosity as a critique of positive law, inasmuch as it permits us to see how its suppression is an ongoing project, whereby its relegation to the margins and the evisceration of its disruptive power (its taming) by the "pragmatic atheism" constitutes, bolsters, and normativizes the hegemonic desire of the state. Within the competition between naturalism or positivism as sources of authority, the stakes are, in political terms, high. If the nonconsensualist model wins, then the source of authority may no longer be exclusively the state. If it does not win, then the state is the sole authority. What I have suggested, however, is that this very competition, this dichotomy, beginning with positivism's extrusion and suppression of morality (understood as a source of law beyond the state), is premised on the initial exclusion of religion from secular morality and from international legal doctrine, despite international law's genesis within, and to some extent, continued fertilization by, religion.¹⁷⁵ As such, it is the exclusionary procedure itself that vests the sourcing and instantiation of authority with its meaning as authority.

The critique of religion as chiasmus can also be seen through the theological lens. Exclusion works as a double helix: The exclusion of sin is the self's overcoming, which then functions metaphysically as its source of authority. This source of authority is dilatory, since it requires that the other (as projected self/sin) be overcome or transcended to lend itself legitimacy as redemptive self. The exclusion is itself the sin, that is, the "evil"¹⁷⁶ of a noninclusiveness with respect to the other; as such, the self's inclusive trajectory—the immanence and countercultural obduracy of faith—is chiasmatic, as always already requiring the persistence of rationalism as a foundational exclusion (the other as alien, foreign, and barba-

172. Iain G.M. Scobbie, Book Review, 93 AM. J. INT'L L. 253, 261 (1999) (reviewing ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* (1997)).

173. *Id.* at 259.

174. *Id.* at 261.

175. See, e.g., Janis, *supra* note 55, at 321 ("[R]eligion traditionally has been one of the most fertile sources of the rules of international law.").

176. See VOLF, *supra* note 62, at 60. "The exclusion signified in 'ethnic cleansing' as a metaphor, is not about barbarity 'then' as opposed to civilization 'now,' not about evil 'out there' as opposed to goodness 'here.' Exclusion is barbarity *within* civilization, evil *among* the good, crime against the other *right within the walls of the self.*" *Id.*

rous)¹⁷⁷ to justify the propulsion of the redemptive, inclusive narrative (“la mission civilisatrice,” or “regime change,” in the context of Iraq II). The meaning of authority and the extension of power are therefore tied in the first instance to the status of the moral question, or to the parameters of morality in its constitution as either *a priori* or *a posteriori* the ethical act.¹⁷⁸

The tension, then, is between religion as undermining positive law and religion as critiquing the means by which positive law creates the conditions for hegemony and moral (unilateral) exceptionalism—the conditions, in short, for its own self-destruction as a (juridical) site of authority.

In the following analysis of the relationship between morality and positive law, I consider further the idea of religion or faith as positive justification (morality in action)¹⁷⁹ and rationalism as exclusion (“negative liberty”).¹⁸⁰ In both, I hope to make clearer the operation of faith as both object (alternative to law) and critique (desire for the law).

II.

A. The Myth of Progress: Morality as Object

Leslie Gelb and Justine Rosenthal write that a positive development has taken place in international relations: the rise of a concern for ethics and more generally the predominance of a moral discourse.¹⁸¹

Morality, values, ethics, universal principles—the whole panoply of ideals in international affairs that were once almost the exclusive domain of preachers and scholars—have taken root in the hearts, or at least the minds, of the American foreign policy community. . . . The rhetoric comes in many forms, used to advocate regime change or humanitarian intervention or promote democracy and human rights, but almost always the ethical agenda has at its

177. “Nietzsche and Foucault . . . rightly draw attention to the fact that the ‘moral’ and ‘civilized’ self all too often rests on the exclusion of what it construes as the ‘immoral’ and ‘barbarous’ other. The other side of the history of inclusion is a history of exclusion.” *Id.* at 62.

178. As I hope to show in the following, exclusion as a foundational procedure or experience within our understanding of modern morality is analogous to the doctrine of original sin. This is particularly so if the category of sin is conceptualized not according to acts (*a posteriori* morality) but according to being (*a priori* morality). See, e.g., VOLF, *supra* note 62, at 73. Volf writes:

The mission of Jesus consisted not simply in *re-naming* the behavior that was falsely labeled “sinful” but also in *re-making* the people who have actually sinned or have suffered misfortune. The double strategy of re-naming and re-making, rooted in the commitment to both the outcast *and* the sinner, to the victim *and* the perpetrator, is the proper background against which an adequate notion of sin as exclusion can emerge.

Id. The elision of sin within secular rational moral discourse disables the possibility of what Volf, quoting Crossan, calls “open commensality.” *Id.*

179. See, e.g., Laurie Goodstein, *A President Puts His Faith in Providence*, N.Y. TIMES, Feb. 9, 2003, § 4, at 4 (noting, under caption: “As a candidate in 2000, George W. Bush often spoke of his faith. As president, he has put it into action.”).

180. Ignatieff, *supra* note 25, at 113.

181. Leslie H. Gelb & Justine A. Rosenthal, *The Rise of Ethics in Foreign Policy: Reaching a Values Consensus*, 82 FOREIGN AFF., May/June 2003, at 2.

core the rights of the individual.¹⁸²

The rise of morality in international relations would appear to suggest the collapse of the erstwhile borders between morality and law and with it the elimination of a public/private divide. Gelb and Rosenthal disagree. In the midst of a progressivist rhetoric with regard to morality's relationship to law, Gelb and Rosenthal's article reflects a severance between moral argument and political interest.¹⁸³ They emphasize the underlying rhetorical calibration of the moral category (agenda, justificatory discourse): "Even if, in the end, a U.S.-led war effort serves to strengthen American power in the region more than anything else, the use of ethical rhetoric will have been a necessary ingredient in furthering that national security agenda."¹⁸⁴

Why should it be necessary to clearly demarcate a space of morality and a separate space for politics and power? Consider the following:

Now that [the American] left and right have largely joined forces on the issue . . . dictators have to bend their precious local values and pay more heed to American entreaties—all the more so when those entreaties are inextricably bound to military and financial inducements . . . [L]eaders around the world understand today that they cannot take American money, beg American protection, and consistently escape the acknowledgement of American values.¹⁸⁵

This progressivist discourse partakes of the triumph of the unilateral, individual, even atomized self outside of legal multilateralist institutions. Gelb and Rosenthal offer humanitarian intervention as "perhaps the most dramatic example of the new power of morality in international affairs. The notion that states could invade the sovereign territory of other states to stop massive bloodshed (call it genocide or ethnic cleansing or whatever) was inconceivable until the 1990s."¹⁸⁶

Vietnam's invasion of Cambodia in 1979 was, arguably, such a humanitarian action.¹⁸⁷ Rhetorically, however, this and other less memo-

182. *Id.*

183. *Id.* at 5. For instance, Gelb and Rosenthal note:

Just how much ethical rhetoric has permeated policymaking is almost nowhere more clearly evident than in the lead up to war with Iraq. The debate about whether and why to go to war has featured a value-laden rhetoric: freedom for the Iraqi people, democracy for Iraq if not for the whole region, and the use of the United Nations (even if grudgingly) to help justify invasion. And this language is often proffered even more by the traditional realists than by the traditional liberals.

Id.

184. *Id.*

185. *Id.*

186. *Id.* at 6.

187. Vietnam's action may or may not have been motivated by humanitarian aims; Vietnam and Cambodia had engaged in low-level warfare for over a decade. See, e.g., Suellen Ratliff, *UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century*, 87 CAL. L. REV. 1207, 1250-53 (1999) (citing a variety of factors for Vietnam's invasion of Cambodia, including the Khmer Rouge's abuse of ethnic Vietnamese in Cambodia, Pol Pot's commission of genocide, and increased border dispute flare-ups between the two states). The 1979 invasion effec-

rable humanitarian interventions may not fit within the paradigm of a new, post-Cold War, triumphalist moralism inaugurated by the United States as the redemptive and "indispensable nation."¹⁸⁸ "Just think of it: states endorsing the principle that morality trumps sovereignty."¹⁸⁹

The extent to which morality trumps sovereignty is, of course, contingent upon the power of the sovereign in that particular instance. Gelb and Rosenthal make it clear that for the United States, the rise in moral discourse has taken a specifically extralegal dimension.¹⁹⁰ Whereas most of the world's nations have approved of international agreements that "they consider part of their moral stance," such as the genocide convention, the International Criminal Court, the treaty banning land mines, and the Kyoto Protocol on climate change, the United States rejects these and similar agreements "on grounds that it suffers disproportionately under their terms."¹⁹¹ This suggests an intentionality, by the sole superpower, with respect to the calibration of the moral in its relationship to international law, and with it the emplotment of a particular story of the development and trajectory of the moral:

Yes, within nations, there will be battles over whether moral or practical concerns should come first and over which moral concerns should take precedence. Even as universal values become more a part of the foreign policies of nations, those policies will still be ridden with contradictions and hypocrisies. And yes, the morality of the strong will generally still prevail over that of the weak, and considerations of value almost inevitably will have to take second place. But they used to have no place. Second place means that leaders now have to be mindful of ignoring or abusing what are increasingly seen as universal values.¹⁹²

This is a story of morality that is separate from "practical concerns," involves the imposition of values of the more powerful, and lays claim to universality. It is a story, in other words, of an elision of the ethical *telos*: By positing an opposition between values and practical concerns, between "ideals" and "self-interest," the story elides the instrumentality of ideals, the extent to which they are operationalized by power for self-interested reasons. The extent to which those values are universal also hides their successful transmutation, taming, and normalization as disinterested. Thus under this progressivist story, morality as object is the perfect triumph of (pure) rationalism—the perfection of what Gelb and Rosenthal refer to as "the necessary ingredients of the national interest."¹⁹³

tively ended the infamous "killing fields" of the Pol Pot regime. See Douglas Eisner, Note, *Humanitarian Intervention in the Post-Cold War Era*, B.U. INT'L L.J. 195, 205 (1993).

188. This is a frequently quoted statement by former Secretary of State Madeleine Albright. See *Nomination of Secretary of State: Hearing Before the Comm. on Foreign Relations*, 105th Cong. 26–27 (1997).

189. Gelb & Rosenthal, *supra* note 181, at 6.

190. See *id.* at 7.

191. *Id.*

192. *Id.*

193. *Id.* at 7 ("Now, ideals and self-interests are both generally considered necessary ingredients of the national interest.").

This story of inclusion is based, of course, on the various levels of moral exclusion, putting paid to the unadulterated paradigm or myth of progress. Thus, the exclusion of religion as a basic index of identity formation¹⁹⁴ has this specific consequence for imagining the self and its global or hegemonic projection: Power maintains the space of the moral separate from, and yet integral to, its self-projection, as an alternative site of authority and legitimacy, i.e., apart from the multilateral legal instruments and institutions.

But this separate yet integral status should locate for us the source of morality as critique, for it begs the question: How does this work, especially when we know that the conflation of religion and law can be toxic with respect to power and authority? Garry Wills, for instance, notes that disestablishment is at the foundation of the American legal system and that even the rhetorical breach that occurs during unusual circumstances, such as before the waging of war or during presidential elections,¹⁹⁵ although common, can be dangerous.¹⁹⁶ According to Madison, religion is "not within the cognizance of civil government."¹⁹⁷ However,

[A] nation with no cognizance of religion has no cognizance of God, and without national recognition of his authority, it will not come within his protection. That is not an advantage a country can do without, especially in times of peril. It is unpatriotic to expose the nation to its enemies without taking every measure possible to insure the divine blessing.¹⁹⁸

The "instrumental use of God (as the endorser of secular policy)"¹⁹⁹ means that "[r]eligion is harnessed to political purpose and is not freely exercised if it does not serve that purpose."²⁰⁰

In the case of Iraq, of course, the state in question—the United States—went to war without the legal authorization that it sought from the interna-

194. By way of analogy, see ANTHONY W. MARX, *FAITH IN NATION: EXCLUSIONARY ORIGINS OF NATIONALISM* 115 (2003).

Western nationalism then began not as fully civic but more ethnic, or at least on occasion exclusionary according to perceived differences Indeed, exclusions and intolerance provided the early foundation and cohesion on which later more liberal and inclusive orders could be built, including parliamentary democracy. Such attempts at liberal nationalism and toleration as we understand it today were only possible after the earlier dirty work was largely completed and despite later denials.

Id.

195. See, e.g., Jodi Wilgoren, *Dean Narrowing His Separation of Church and Stump*, N.Y. TIMES, Jan. 4, 2004, at A12 (noting that former presidential candidate Howard Dean "gradually [became] more comfortable with talking about religion" when the "secular tone" of his campaign became an issue).

196. Garry Wills, *With God on His Side*, N.Y. TIMES, Mar. 30, 2003 (Magazine), at 26-29.

197. *Id.* at 26.

198. *Id.* Moreover, "[w]hat makes religion so salient in time of war is that it acts the way revivals did for [Jonathan] Edwards Individuals merge in the joint peril and joint effort of facing an imminent menace. . . . This communal sense arose, most recently, in the wake of the Sept. 11 attacks" *Id.* at 28-29.

199. *Id.* at 29.

200. *Id.*

tional community.²⁰¹ As such, the principal justification for war was moral²⁰² rather than legal.²⁰³ The situation has thus been compared with the rationale provided to the British public by their government. There, the legal justification and warrant for war was the weapons of mass destruction (WMD) issue.²⁰⁴ Tony Blair, the British Prime Minister, told Sky TV that WMD were the basis in law for taking military action.²⁰⁵ Nevertheless, in the absence (at writing) of the discovery of such weapons, the threat to the British government was grave, with accusations that “the intelligence dossier on Iraq published by the Government last September [2002] was ‘sexed up’ to convince a sceptical public that they were in danger.”²⁰⁶

Meanwhile, because the United States government gave no single rationale for going to war and even suggested that the WMD issue was pretextual,²⁰⁷ it has generally fallen back on the moral justifications. Furthermore,

201. See, e.g., THE AMERICAN SOCIETY OF INTERNATIONAL LAW, ASIL MEMBERS SPEAK OUT (Spring 2003) (pamphlet, on file with author). Legal scholars are divided on this issue: some, like Ruth Wedgwood, maintain that “[t]he founding legal framework for action against Iraq remains intact and available to those who are willing to use it,” noting that Security Council Resolution 687 (from the first Gulf War in 1991) is sufficient authorization for a preemptive attack against Iraq in 2003. *Id.* As Jules Lobel notes, “Resolution 678 was passed to allow U.N. members to drive Iraq out of Kuwait. It’s now being used almost 13 years later on something that had nothing to do with the original intent and purpose of the resolution.” *Id.* Others, such as Thomas M. Franck, also disagree with the legitimacy argument, indicating that “nothing, neither in the Charter nor in Resolutions 687 and 1441, has, by any means, transferred to the member States the power of unilaterally deciding the opportune moment for the use of force against a recalcitrant Iraq. These two resolutions reserve this decision to the Security Council only” *Id.*

202. See, e.g., Steinfels, *supra* note 52. Steinfels discusses how President Bush used religious rhetoric when justifying the war in Iraq: “Mr. Bush does not disguise that his evangelical Christian convictions are an essential part of how he makes decisions, and he has not hesitated to link them with the war on Iraq.” *Id.*

203. For reasons other than moral or legal, see, e.g., Robert H. Reid, *Wolfowitz Interview Draws Fire*, BOSTON GLOBE, May 31, 2003, at A8, discussing Deputy Defense Secretary Paul Wolfowitz’s comments to *Vanity Fair* magazine in May 2003 that the weapons of mass destruction (WMD) issue was pretextual and the subsequent reaction:

In the interview, Wolfowitz cited one outcome of the war that was “almost unnoticed, but it’s huge”: It removed the need to maintain American forces in Saudi Arabia as long as Hussein was in power. *Vanity Fair* interpreted Wolfowitz to say that the withdrawal of U.S. troops from Saudi Arabia was a major reason for going to war, rather than just an outcome.

Id. Other critics note that apart from the moral and legal issues, the war was fought “on false premises,” given that evidence of weapons of mass destruction and an Al Qaeda link has not surfaced. See Paul Krugman, *Waggy Dog Stories*, N.Y. TIMES, May 30, 2003, at A27.

204. See Gaby Hinsliff et al., *Blair: I Have Secret Proof of Weapons*, THE OBSERVER, June 1, 2003, at 2.

205. *Id.*

206. *Id.*

207. *Id.* (“Downing Street has been hampered in its argument by repeated suggestions from the Bush administration that WMD may never be found. Paul Wolfowitz, deputy to the US Defence Secretary Donald Rumsfeld, suggested last week that WMD were a bureaucratic pretext to start war.”)

Bush has been very good at fooling the American people into thinking that Saddam Hussein was behind the attack on the World Trade Center in New York and the Pentagon in Washington and that he is an ally and supplier of Al Qaeda, that eliminating him is the best way to keep terrorism from our shores.²⁰⁸

Although Wills disagrees with these findings and this rationale for war,²⁰⁹ this rationale nevertheless emphasizes a moral justification for removing Saddam regardless of whether there was legal license to do so.²¹⁰

The moral argument as extrinsic to the legal rationale for the transnational use of force offers, therefore, an alternative legitimacy. This, at least, is true of the exploitation of religion as "an engine of civil policy."²¹¹ The exclusion of religion as a source of legal legitimacy necessarily enervates the capacity of religion to co-opt the instruments of state power, authority, and control. "Disestablishing religion, [Madison] argued, does not demote religion but protects it from exploitation by political authority, from 'an unhallowed perversion of the means of salvation.' . . . As he put it, 'religion flourishes in greater purity without than with the aid of government.'"²¹²

The diremption of morality and law expressed by the separation of church and state requires a conceptualization of religion and law as pure of each other. The separation means that the deployment of one by the other across the border of exclusion entails an attenuation of juridical review on the one hand, and of what might be referred to as intersubjective (or intersectional) identity on the other. Writing about the need for due process in trying the defendants currently held in Guantanamo Bay, Laurence Tribe notes:

For our government to retain its legitimacy, its conduct must always be subject to challenge in a court of law. Nor can this judicial review be an empty gesture; lawyers must be allowed ample access to those the government would detain. It is the threat—and the promise—of judicial intervention that keeps executive power from veering into tyranny.²¹³

Under this rubric, if a government's rationale is nonlegal, and if the action is accepted as ethical under a conception of the moral or religious impetus as discontinuous with political and legal identity (an ethics of discontinuity, severance, exclusion), then acceptance bolsters the case for the

208. Wills, *supra* note 196, at 29.

209. *Id.*

210. See also Slovoj Žižek's response to the government's war rationales, as quoted in Rebecca Mead, *The Marx Brother: How a Philosopher from Slovenia Became an International Star*, THE NEW YORKER, May 5, 2003, at 47. He writes:

Žižek was against the war in Iraq . . . but not . . . because there was insufficient reason to attack Iraq. He suggested that the United States had adduced too many reasons. "What if the true purpose of the war is to pass to a global emergency state?" he said . . . "It is not that the ends justify the means; the end is the means themselves."

Id.

211. Wills, *supra* note 196, at 29 (quoting Madison).

212. *Id.*

213. Laurence H. Tribe, *Citizens, Combatants and the Constitution*, N.Y. TIMES, June 16, 2002 (Week in Review), at 13.

enervation of law as a constraint upon a state's moral or religious rationale. The possibility for legal review is attenuated and the license or discretion to act extralegally is broadened.

Thus, in effect, disestablishment functions in part as a cover for, and normalization of, an ethics of discontinuity, with all that it implies in terms of moral exceptionalism. The expansion of discretionary action reflects a parallel delimitation of the intersubjective space between self and other, inasmuch as this space is conceived as a project of mutual construction and complicity. Delimiting this space, or the recognition of the "unstable" reversibility of self and other as, in Gillian Rose's formulation, "equally enraged and invested,"²¹⁴ must lead to fewer *rational* alternatives for resolving conflicts. The line from severance to delimitation to violence (as failure of the *logos*) is swift.²¹⁵ The point here is twofold, both having to do with individual identity and its analogy to the state. First, the exclusion of religion, with its historical roots in the rise of nationalism²¹⁶ and the acclimation of Enlightenment rationalism (liberal individualism)—indeed, the "beginning of history" in the creation of the rule of law "*ex nihilo*"²¹⁷—has,

214. ROSE, *supra* note 69, at 75.

[M]y relation to myself is mediated by what I recognise or refuse to recognise in your relation to yourself; while your self-relation depends on what you recognise of my relation to myself. *We are both equally enraged and invested*, and to fix our relation in domination or dependence is unstable and reversible, to fix it as 'the world' is to attempt to avoid these reverses. All dualistic relations to 'the other,' to 'the world' are attempts to quieten and deny the broken middle, the third term which arises out of misrecognition of desire, of work, of my and of your self-relation mediated by the self-relation of the other.

Id. at 74-75

215. See VOLF, *supra* note 62, at 91.

The tendency toward violence is, moreover, reinforced by an inescapable ambiguity of the self. The self is dialogically constructed. The other is already from the outset part of the self. . . . Hence the will to be oneself, if it is to be healthy, must entail the will to let the other inhabit the self; the other must be part of who I am as I will to be myself.

Id. Volf goes on to note the inherent descent into violence when identity remains at this dialogic level: "Hence I slip into violence: instead of reconfiguring myself to make space for the other, I seek to reshape the other into who I want her to be in order that in relation to her I may be who I want to be." *Id.*

216. See MARX, *supra* note 194, at 113-15. Marx discusses how nationalism was "built . . . through exclusion":

Homogeneity was established by such forceful and often violent exclusion, which was not voluntary. Where passions of faith had been fanned and so channeled, increased popular engagement and consolidated identity emerged as an early form of nationalism. In Spain, France, and England, religious antagonisms inherited from the past were deployed to bolster state authority (or resistance to it) and unity of a majority, consolidated to varying degrees on the basis of common faith.

Id. at 114-15.

217. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 16 (1999).

The rule of law represents a turn to a secular conception of the state, i.e., a state severed from any dependence on a divine order. Law is, for us, a distinctly human creation . . . The legal order . . . exists wholly within history The rule of law begins when man steps into the place previously held by God. For God, reason and will always coincide in the word—the *logos*. Creation

according to Paul Kahn, bequeathed modern psychology with its own mode of subject formation, which Kahn describes as "[r]eason and desire compet[ing] for the loyalty of will."²¹⁸ The myth of positive law's origins that requires the severance from religion as source and creation of law extends to the persistent dichotomy and hierarchization between public and private, objective (rational) and subjective (irrational), and between "terrible purity" and "the tribal fury that rages when opposing perspectives are let loose."²¹⁹

The persuasive power of this myth attests, if nothing else, to the enormous investment in maintaining and naturalizing the severance; disestablishment seems natural and axiomatic when cast as a contest between reason and desire, precisely because we cannot conceive of law and the divine within the same space, like a confused corruption of human will. But, like Michel Foucault's carceral society,²²⁰ the naturalness of disestablishment, as with the sequestering of the private from public discourse (naturalized exclusion), hides within it the self's investment in power and dominion and the self's complicity in the project of self-regulating the borders of identity.²²¹

The same myth of pure origins extends to a future of identity as unsullied reason or asserted will. In Kahn's words, "The self is already complete at the same time that it appears as an endless project—a project of reform. So too is the state under law's rule."²²² As religion, on the one hand, and

is inseparable from speech. Man, on the other hand, must always *work* to subordinate will to reason. The origins of our rule of law are represented in a tale of creation—indeed, creation *ex nihilo*—not a tale of evolution out of a merely natural order.

Id. at 15–16.

218. *Id.* at 17.

219. Johnson, *supra* note 1, at 79.

220. Volf discusses Foucault's "carceral mechanisms":

"[C]arceral mechanisms" that function throughout the society exercise "a power of normalization" . . . and render people docile and productive, obedient and useful. As a power of normalization, exclusion reigns through all those institutions that we may associate with the inclusionary civilization—through the state apparatus, educational institutions, media, sciences. They all shape "normal" citizens with "normal" knowledge, values, and practices, and thereby either assimilate or eject the "ab-normal" other. The modern self, claims Foucault summarizing his own work, is indirectly constituted through the exclusion of the other. It was, of course no different with the pre-modern self; it too was constituted by a series of exclusions.

VOLF, *supra* note 62, at 62.

221. See, e.g., Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM/LEFT CRITIQUE 56 (Wendy Brown & Janet Halley eds., 2002) (positing the story of Orlando Patterson's defense of Clarence Thomas's "Rabelaisian" comments to Anita Hill as "immediately recognizable to Hill and most women of southern working-class backgrounds, white or black, especially the latter," as an instance of the self-regulation of racial identity).

222. KAHN, *supra* note 217, at 17.

Viewed normatively, character should be the product of reason. Yet, even if reason fails, identity is affirmed in assertions of the will. One can answer the question of personal identity by appealing to an idealized future in which the self will

nature, on the other,²²³ are excluded under this conception of law and identity, so the other is also radically severed from the self as both conception and project (projection), delimiting the possibility of identity-in-relation, or intersubjectivity.

The myth of creation outlined above elides the extent to which the rule of law and the problem of subject formation is an evolutionary phenomenon; we see history in clarifying moments, moments of purity.²²⁴ But the progressive march toward inclusivity and tolerance is founded on an originary and consistent series of exclusions. Disestablishment itself is not *per se* evidence of "progress." The problem is not with establishment but with how the formation of the myth of progress and the "creation" of the rule of law has put to use the conurbation of church and state.

Historically within the West, disestablishment led to greater religious tolerance and, as such, a curb on the international and civil wars waged on the basis of religion. But the procedures whereby religion functioned as the exclusionary principle were translated, in a sense, to the increasingly necessary and important new emphasis upon national, ethnic, and ideological identity. While the enlightened self was defined by the liberal nation-state, the illiberal other was defined by ethnicity, religion, factionalism, and so on.²²⁵ Furthermore, disestablishment within the Western nation-state did not, of course, prevent the waging of enlightened and messianic wars abroad, since at base the procedure requires a celebration of the civic self

express the reasonable principles to which it is committed or by appealing to the current and past mix of interests that the will has found compelling.

Id. Kahn also writes: "What the law is is inseparable from what the law should be." *Id.* at 15.

223. "The double ideas of reason and will that operate in our conception of law's rule have an historically specific, normative place that must be contrasted with two competing conceptions: divine grace and natural desire." *Id.*

224. See MARX, *supra* note 194, at vii. In Marx's view, the birth of nationalism can be seen as one such moment of purity:

Few descriptions of the past have been as idealized as traditional accounts of the origins of Western nationalism. As a product of the eighteenth-century revolutions, initial European nationalism was lauded as a liberal form of mass political engagement and allegiance to the secular power of emerging states, consistent with popular rule. Accordingly, its birth was announced with the representation, rights, and toleration of England's constitutional monarchy and its banner the "liberty, equality and fraternity" of the French Revolution against absolutism.

Id.

225. See *id.* at vii-x. Marx elaborates on the distinction between liberal Western and illiberal non-Western nationalism:

This Whiggish triumphalism [of nationalism] was an inheritance of the purported founding of nationalism in the West during the Enlightenment, with nationalism seen as the quintessential expression of inclusive tolerance. And this image was then often reinforced by a distinction between the West's "civic" nationalism and illiberal "ethnic" nationalism that emerged later or elsewhere: the conflict-ridden and exclusionary efforts at non-Western or more recent nation-building, as in eastern Europe or Africa, have been denigrated and distinguished from the Western experience. As the central organizing principle of modern politics, nationalism was thus dichotomized between a noble Western invention and an ignoble non-Western imitation.

and a "facile denigration of others."²²⁶

Thus, Wills's criticisms of the Bush Administration for its invocation of God in time of war²²⁷—for this instrumental collapse between the public and the private domains at the behest of the nation-state in crisis—are salient not because they prove that whenever a person or entity invokes religion they are trying to manipulate someone else, or they feel morally superior to another. On the contrary, they show that any moral schema, including the liberal individualism of modern secular morality and the preserve of the human rights narrative that sits at the margins of international law *sensu stricto*, can be deployed to Manichean effect and operationalized for political purposes.

In sum, the story of the exultant rise in moral rhetoric within international legal discourses may at first blush seem to be a welcome development, but on closer inspection suggests the exploitation by power of the moral category for the extralegal authority to wage war. Power's co-optation of the moral category also suggests the ongoing investment in originary severance, in the myth of the rule of law's creation *ex nihilo*, and in rationalism's efflorescence as contingent upon the repudiation of religion. The fantasy of purity in turn occludes the exclusion, with its attendant violence, thereby rendering natural the hierarchy between naked and sacred spaces, as well as our investment in a "practical atheism" as the norm. At the heart of the self's conception is a rigorous suppression and denial, therefore, of this originary procedure and of its normative persistence, seemingly revealing its lineaments only under the pressure of crisis and war.

It may be suggested that it is simply the memory of the West's relationship to religion, its "escape"—or so the story goes—from the savage religious wars of the past to the increasing international religious tolerance of Augsburg and Westphalia,²²⁸ that highlights the drama of deploying religion within the context of war. But I wish to show in the following that, notwithstanding the myriad reasons we should celebrate the rise of liberal individualism and the protection of rights afforded to millions globally, a critique of its particular prejudices and exclusions, especially of religion, is nevertheless required. To be sure, as Volf points out, "[t]hose who are conveniently left out of the modern narrative of inclusion because they disturb the integrity of its 'happy ending' plot demand a long and gruesome

Even as this self-serving distinction of inclusive Western solidarity and others' violent exclusions has come under increasing scholarly criticism, it retains its hold on the popular Western imagination.

Id. at vii-viii.

226. *Id.* at ix.

227. See *infra* note 232 and accompanying text.

228. Little, *supra* note 166, at 324. Little discusses the "new terms of accommodation between religion and government being worked out in the sixteenth and seventeenth centuries in Europe" and how the Peace of Augsburg (1555) and Peace of Westphalia (1648) "provided for a novel, post-medieval pattern of religious toleration and partial religious liberty." *Id.*

counter-narrative of exclusion."²²⁹

A critique is also required because the exclusionary procedure, as evinced in the above story of the deployment of the extralegal space of the moral as religious for the purposes of pursuing a war and advancing the sovereign's power, has dire consequences for how we see ourselves and the other—that is, how we imagine the possibility for identity-in-relation or an intersubjectivity that repudiates the diminishment of the other as morally inferior through the nonrecognition of the *legitimacy* of the other's relationship to God. Because secularism (rationalism) adopts a pallid and immanent religiosity (e.g., the messianism of human rights, "faith" language in relation to the United Nations, etc.²³⁰), we cannot appropriate the radical and revolutionary nature of faith as a critique of dominant power from within a reconceptualized public (civic) space.

In the result, the creation of separate spaces for law and morality pursuant to the exclusion of religion from public discourse means that the power of religion and morality are more generally available for self-interested exploitation, not only outside the parameters of law's policing or surveillance, but also at the expense of the multilateralism of legal procedures and institutions. "*Deus lo volit*"²³¹ compels a stringent dichotomy and hierarchy between the self and other. As Wills points out regarding Bush's war

229. VOLF, *supra* note 62, at 59. Volf continues further:

Barbaric conquest, colonization, and enslavement of the nonEuropean [sic] other, legitimized by the myth of spreading the light of civilization—this is a nonEuropean counter-narrative of exclusion suppressed by the modern narrative of inclusion. And that counter-narrative is no unfortunate side-plot that, were it excised, would leave the pace and the shape of the narrative of inclusion intact. The undeniable progress of inclusion fed on the persistent practice of exclusion.

Id. at 60. In a footnote, Volf adds, *inter alia*:

My point is not that there is something distinctly modern about the narrative of exclusion, say something in the "logic" of modernity that made the modern history of exclusion qualitatively different from many nonmodern histories of exclusion My point is simply that there is something profoundly misleading if the account of modernity is given as a progress of inclusion without paying attention to the shadow narrative of exclusion.

Id. at 60 n.1.

230. See, e.g., Weisburd, *supra* note 139, at 278. Weisburd quotes Professor Alvarez: "International lawyers share an appealing evangelistic, even messianic, agenda. We are on a mission to improve the human condition Multilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the UN." *Id.*

231. Meaning "God wills it." See, e.g., Andrew Curry, *The First Holy War*, U.S. NEWS & WORLD REP., Apr. 8, 2002, at 39. Curry describes how recent Crusades scholarship has come to recognize that "faith could move people to violence as easily as could greed or land." *Id.* He gives the First Crusade, called by Pope Urban II, as an example:

Eager to unite warring Christians, on Nov. 27, 1095, [Pope Urban II] spoke to a massive crowd gathered near Clermont in France. Describing the cruelties inflicted by Muslims on Christian pilgrims trying to visit Jerusalem and the defeats suffered by the Byzantine Christians, he called on all of Western Christendom to rescue their Eastern brethren. "They should leave off slaying each other and fight instead a righteous war, doing the work of God, and God would lead them. For those that died in battle there would be absolution and the remission of sins"

rhetoric, "His calm assurance that most of the world and much of his nation is wrong [regarding the war in Iraq] comes from an apparent certainty that is hard to justify in terms of geopolitical calculus. It helps, in making that leap, to be assured that God is on your side."²³²

This "calm assurance"—the radical innocence of the self and radical evil of the other—is ancillary to the extrusion of the moral category from the accountability review implicit within a legal discourse. I suggest, therefore, that although religion is preserved and its freedoms protected through disestablishment as envisioned by Madison, this preservation and tolerance are nevertheless bound up within the particular history of the West's break from the fraught relationship with religion. It is bound within the instrumental use of religion by burgeoning nation-states to stir up passions and create pockets of support to centralize power,²³³ and not because of religion as a counterjuridical discourse.

But this means we must query the particular parameters of the liberal tradition itself and its colonization of the moral discourse at the international level.²³⁴ Using the enterprise of human rights and humanitarian intervention as the vessels of an international moral discourse and bearing in mind the underwriting myth of pure origins, one may ask: Why should it be unexceptionable that God is eliminated from the narrative of human rights and morality more generally? Why should God's elimination be at the core of modern morality's claim to universality? And why, in the face of challenges from without and within human rights, should the claim to universality become attenuated and, as a consequence, present a false or at least a partial perspective on the function and utility of morality within international law and politics?

The banishment of God, pursuant to the diremption of law and morality, is at the center of a project of rationalism's protection from the ravages of passion, rage, investment, nature, and chaos—in short, the law's self-purification of the discourses of blood and belonging. I have suggested

The response was tremendous. Urban's speech was interrupted by cries of "Deus lo vol"—"God wills it."

Id.

232. Wills, *supra* note 196, at 29. Wills continues:

One of the psychological benefits of this [clarity, purity] is that it makes one oppose with an easy conscience those who are not with us, therefore not on God's side. They are not mistaken, miscalculating, misguided or even just malevolent. They are evil. And all our opponents can be conflated under the heading of this same evil, since the devil is an equal opportunity employer of his agents.

Id.

233. MARX, *supra* note 194, at 115.

234. Recall MCFADYEN, *supra* note 87, at 14, for the heuristic involved in this discussion regarding modern secular morality and the foundational exclusionary procedures: Constructing an engagement between modern culture and a mode of Christian discourse that chafes against it as its antithesis should, therefore, throw into sharp relief the basic beliefs and assumptions concerning human beings and the human situation that shape the way we habitually construe and deal with the pathological in human affairs.

Id.

that this very exclusion, however, appears to undermine the legitimacy of law, or at least its monopoly on authority and the legitimization of the state's violence. How is this to be resolved, since opening the door to these narratives within the public discursive space would threaten to swamp that space? The answer seems to be that (1) to the extent that those excluded narratives can be seen as both positive and negative (and not simply negative), their danger to the clean and proper body is tamed; and (2) the threat is also tamed when we see that faith's a priori, "natural" exclusion is in fact a strategy designed to engender the self-regulation of secular and moral identity. This pushes us to accept the universality of the ethical, of "my act" as ultimate (versus my being as complex, broken, and complicit in power), to the extent that we can begin a conversation with faith that does not presuppose our moral superiority and therefore our moral right to hegemony. This is the conversation that begins in exclusion but ends in embrace.

Finally, I note that the Singer-Johnson story with which I started²³⁵ may do no more than act as a cautionary tale: Moral paradigms are powerful, and it is not easy to circumvent one man's belief, for instance, that another has no right to exist. But this is a function of the abject and its painful presence and the pleasure of its expurgation, cleansing, and redemption. And this is where faith as the irrational other returns to say, "What if? What if I'm wrong?" To ask this question of the secular liberal individualist tradition is simply to engage, once again, with the possibility of its limits as they affect and constrain alternative paradigms and ways of being, in order to enable the conceptualization of a more capacious civic space.

I turn then to an examination of the concept of secular liberalism as a "negative liberty," or "freedom from" the intervention of the state.²³⁶ One may already see a limit to this conception in that there is always a substantive quotient to the construction of a negative (naked) space, both with respect to what is excluded, and in terms of the substantive policy, with respect to the promulgation of rights involved.²³⁷

235. See *supra* Section I.A.

236. See Ignatieff, *supra* note 25, at 113 (discussing negative liberty as an advantage of liberal individualism).

237. See Ford, *supra* note 221, at 63.

The conception of rights as *limits* on state power occludes the way rights are a *form* of state power. Under the influence of the former conception, when we analyze rights we do so with one eye closed, blind to the possibility that the right in question itself produces a new type of social control that we may not want to submit to in the long run.

Id. Also,

It is difficult to see how rights impose specific and controversial substantive norms . . . because we have been taught in the liberal tradition to believe that rights safeguard freedom in an ideologically neutral fashion. Moreover, the process is one that covers its tracks: because people internalize the norms advanced by the discourse in question, those norms are experienced as chosen, intuitive, and organic rather than imposed, contrived, and, to some extent, state-made.

The conception of rights as negative liberty is continuous with the view of modern psychology, suggested by Paul Kahn, as a contest between reason and desire for the will; that is, as an intervention of reason to counter the chaos of human desire.²³⁸ Liberal individualism as negative liberty is consistent with the narrative of the Western tradition as benign, rational, redemptive, and indispensably interventionist in a chaotic world.

B. Negative Liberty as Paradigm of Modern Morality

In noting that “the pendulum shift” away from “the military establishments of leading states” toward “more activist and publicly aggressive N.G.O.’s—including . . . the new International Criminal Court,” Kenneth Anderson suggests a corrective: that the pendulum shift back, and that “the ownership of the laws of war . . . give much greater weight to the state practices of leading countries.”²³⁹ Anderson argues against the moral impulse or imperative to delimit state sovereignty (and by implication positive international law) at the behest of the human rights movement and its “absolutist . . . ideology.”²⁴⁰ The state appears to cede sovereign power by pursuing the moral course and adhering to the laws of war, but the enemy belligerent ignores those laws and cedes none of its sovereignty.²⁴¹

It [i.e., a general NGO preference for “the international over the national”] thus promotes, embedded in an agenda of human rights and the laws of war, the ceding of sovereignty, even democratic sovereignty, as the most virtuous act that a state can perform on behalf of its citizens.²⁴²

Anderson’s analysis reflects the moral act as a ceding of power, as (self) negation. But the same act could also be seen as intrinsically political, invested with self-interest.

For instance, David Rieff suggests that human rights and humanitarianism should properly be seen within the political, rather than the moral, domain.²⁴³ He characterizes humanitarian intervention as war and insists that, while humanitarian intervention may be “warranted and just,” it should “be called by [its] right name, not sanitized by the term humanitarian intervention.”²⁴⁴ Once desanitized, human rights as the basis for intervention will be taken out of the moral domain and into the political:

The virtue of the political is that the case for making the most tragic of all public decisions becomes controversial and a matter for public debate, rather than some kind of categorical moral imperative whose need to be

Id. at 62.

238. KAHN, *supra* note 217, at 17.

239. Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES, Apr. 13, 2003 (Magazine), at 6, available at <http://www.genocidewatch.org/WhoOwnstheRulesofWar.htm>.

240. *Id.*

241. *Id.*

242. *Id.*

243. See Richard Falk et al., *Humanitarian Intervention: A Forum*, THE NATION, July 14, 2003, at 15.

244. *Id.* “What we really mean when we speak of humanitarian intervention (or human rights intervention, or ‘the responsibility to protect,’ two newer versions of the same formulation) is war.” *Id.*

undertaken is deemed to be self-evident.²⁴⁵

Rieff's view submits the ethical act and the "self-evidence" of its moral suasion to the political domain.²⁴⁶ He does not go further and divest the moral of its autonomous authority by submitting it, as politics, to juridical accountability or review.²⁴⁷ Nevertheless, to the extent that morality is severed from the traditional—legal, sovereign—source of state power, the state is free to utilize and exploit this discretionary alternative source of authority absent juridical scrutiny (which may even include a rhetoric of accountability) in the form either of politics or of morality,²⁴⁸ and argue from this legitimacy.²⁴⁹ As such, although the suggestion of legal reform according to a recalibration of the relationship between morality and law, including the relationship between religion and morality, might indeed be naïve, the abandonment of at least an imagined reconceptualization of these relationships leaves intact the compromised, unpersuasive, and dangerously productive interpellations—of humanitarianism and U.S. military power, for instance—that Rieff criticizes.²⁵⁰

245. *Id.*

246. *See id.*

247. *See id.* In fact, Rieff has elsewhere expressed an impatience with the view that submission to international law will somehow restrain power, including power that is harnessed to a rhetoric of moral authority. Interview by Robert Birnbaum with David Rieff, Author (Nov. 20, 2002), at www.identitytheory.com/people/birnbaum74.html (last visited July 18, 2003) [hereinafter Rieff Interview]. In criticizing Samantha Power's view of the relationship between American moral values and its political actions abroad, Rieff says:

I'm quite skeptical of Samantha's view that—I am not skeptical of her anger, which I share and which I honor her for and that she has expressed in her book in a very noble way—I am skeptical of her idea which, again, I think is unbelievably naïve and legalistic. That somehow if the United States government can be brought to its senses and understand its obligations under international law that somehow all will be well.

Id.

248. *See* Falk et al., *supra* note 243, at 15. Speaking of humanitarian (i.e., moral) interventions, Mahmood Mamdani says: "Unless all interventions (both military and nonmilitary) by all powers are subject to review by some organization of international law, we will not be able to determine the justness of a particular intervention (or nonintervention)." *Id.* Although the point is that the law will provide the means to determine the moral justice of the action, it also suggests that a purely moral action will be subject to some institutional scrutiny and, as such, restrain the self-evidence of an authority the moral is assumed to possess.

249. *See, e.g.,* Richard W. Stevenson, *Bush at His Side, Blair Is Resolute in War's Defense*, N.Y. TIMES, July 18, 2003, at A1. British Prime Minister Tony Blair defends the war against Iraq on moral grounds, arguing that "history" will be the judge of its ultimate legitimacy:

Can we be sure that terrorism and weapons of mass destruction will join together? . . . Let us say one thing: If we are wrong, we will have destroyed a threat that, at its least, is responsible for inhuman carnage and suffering. That is something I am confident history will forgive.

But if our critics are wrong, if we are right, as I believe with every fiber of instinct and conviction I have that we are, and we do not act, then we will have hesitated in the face of this menace when we should have given leadership. . . . That is something history will not forgive.

Id. at A8.

250. *See, e.g.,* Rieff Interview, *supra* note 247. Rieff says:

And it is precisely this productive²⁵¹ relationship between power and moral value (or truth, in Foucault's terms)²⁵² that is absent from Michael Ignatieff's analysis of the moral content or element of international law. Ignatieff begins his analysis by suggesting that "[s]ince 1945, human rights language has become a source of power and authority,"²⁵³ implying an insight into power's deployment of the language of human rights. Instead, Ignatieff presents the human rights discourse, and the morality that underpins it, as independent of power.²⁵⁴ This not only obviates the linkage decried by Rieff, but also replicates and extends a pristine and neutral moral discourse in the analysis of foreign policy by Gelb and Rosenthal outlined above.²⁵⁵ Indeed, Ignatieff goes further and eviscerates the language of human rights, or more generally secular moral discourse, of substantive content,²⁵⁶ a move that ratifies the exclusionary procedure at the core of a modern secular morality, and thereby concretizes morality's relationship to power.

Ignatieff suggests three challenges to the claim to universality of the human rights doctrine: one from Islam, the second from East Asia, and the third from within the Western human rights tradition itself.²⁵⁷ In each case, however, Ignatieff makes clear that the challenges to the claim of universality are political and that the claim itself resists challenge at its most basic level—the level of the individual human person.²⁵⁸

When discussing the challenge from Islam, for instance, Ignatieff gives as an example the objections to provisions within the Universal Declaration of Human Rights ("UDHR") regarding free marriage choice and freedom of

I think . . . there is much more in common between the human rights activists and the Bush [A]dministration than either side is comfortable admitting. Fundamentally, they are revolutionaries from above, in the old Trotskyist sense and think they can change the world. [They] [t]hink they know how to change the world and have no qualms or modesty about doing it. Of course, they regret the need . . . Humanitarians will say, "It's not US power, it's human rights. It's international law." I find all these concepts unbelievably unpersuasive.

Id.

251. See VOLF, *supra* note 62, at 61. Volf notes that Foucault first describes the exclusionary mechanism as a "double repressive strategy of 'binary division' (mad/sane; abnormal/normal) and 'coercive assignment' (out/in)." *Id.* Moreover, for Foucault, "exclusion is not simply a matter of repressive ejection, but of productive formation." *Id.* at 62.

252. See *id.* at 246 (citing MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977*, at 131 (Colin Gordon et al. trans., Pantheon Books 1980)). According to Volf, for Foucault,

The relation between power and truth is not a one-way street, however: power only producing truth. Truth itself is not powerless; it holds sway over people or, as Foucault states, it "induces regular effects of power." "Truth" therefore gives even more power to the powerful. Truth is produced by a power in order to wield power. It is a weapon in social struggle.

Id.

253. Ignatieff, *supra* note 25, at 102.

254. See *id.*

255. See *supra* Part II.A.

256. See Ignatieff, *supra* note 25, at 102.

257. *Id.*

258. *Id.* at 105.

religion, and notes that “the critical variant is not Islam itself but the fateful course of Western policy and economic globalization.”²⁵⁹

Likewise, the challenge “within the West itself” holds that “human rights are a ‘Western construct of limited applicability.’”²⁶⁰ They are dependent on the liberal individualist traditions of the United States, the United Kingdom, and France, and are thus inapplicable in cultures that do not share this tradition.²⁶¹ The various strains of postmodernism critique the West’s “language of human rights” as being “Western intellectual hegemony.”²⁶²

[N]o longer able to dominate the world through direct imperial rule, the West now masks its own will to power in the impartial, universalizing language of human rights and seeks to impose its own narrow agenda on a plethora of world cultures that do not actually share the West’s conception of individuality, selfhood, agency, or freedom.²⁶³

This critique has required human rights activists to “pause and consider the intellectual warrant for the universality they once took for granted.”²⁶⁴

The third challenge to the claim of universality comes from East Asia, which has become very economically successful in recent years.²⁶⁵ Malaysia is an example of a country whose “robust economic growth” has given its leaders the confidence to reject Western liberal individualism “in favor of an Asian route to development and prosperity—a route that depends on authoritarian government and authoritarian family structures.”²⁶⁶

Ignatieff attempts to rescue the claim of universality of the human rights doctrine by pointing out that the doctrine’s heritage is not purely Western and by reinforcing its essential individualism.²⁶⁷ He argues that the drafting committee of the UDHR attempted to draw from “a range of moral universals from within their very different religious, political, ethnic, and philosophical backgrounds.”²⁶⁸ This helps to explain the omission of God from its preamble, for the communist delegations and competing religious traditions would not have agreed on a reference to God.²⁶⁹ Ignatieff concludes that “the secular ground of the document is not a sign of European cultural domination so much as a pragmatic common denomina-

259. *Id.* at 104; see also *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

260. Ignatieff, *supra* note 25, at 104.

261. *Id.*

262. *Id.* at 104–05.

263. *Id.* at 105.

264. *Id.*

265. *Id.*

266. *Id.* at 106.

267. *Id.* Ignatieff notes that the Chinese, Middle Eastern Christian, Marxist, Hindu, Latin American, and Islamic traditions were all represented at the drafting of the Universal Declaration. *Id.*

268. *Id.*

269. *Id.* “The communist delegations would have vetoed any such reference, and the competing religious traditions could not have agreed on words that would make human rights derive from human beings’ common existence as God’s creatures.” *Id.*

tor designed to make agreement possible across the range of divergent cultural and political viewpoints.”²⁷⁰

As such, although the declaration of the UDHR “may still be a child of the Enlightenment . . . it was written when faith in the Enlightenment faced its deepest crisis.”²⁷¹ Ignatieff continues: “It remains true . . . that the core of the declaration is the moral individualism for which it is so reproached by non-Western societies.”²⁷²

Ignatieff then adumbrates the essential elements of the human rights doctrine in terms of this core liberal individualism: Rights are political, individualistic by definition,²⁷³ universal,²⁷⁴ and de minimus.²⁷⁵ In fine, human rights are a form of “what the philosopher Isaiah Berlin called ‘negative liberty’: to be free from oppression, bondage, and gross physical harm.”²⁷⁶ As such, “[h]uman rights have gone global by going local, empowering the powerless, giving voice to the voiceless.”²⁷⁷

It is the emphasis on the source of human rights as coming, not from the top down, but rather from the bottom up²⁷⁸ that ironically compromises the seamless picture of the doctrine as neutral, empty of content, morally empowering of individuals against the state, and redolent of the myth of escape from the barbarism of “collectivism” to an enlightened and redemptive individualism.

But one may ask what is missing from this account, as beautiful and emancipatory as it is. One criticism of human rights, for instance, suggests that the human rights legal regime serves more to excuse violations rather than to actually prevent and remedy them.²⁷⁹ One wishes to interrogate a discourse of elision and emptiness to determine what it has jettisoned to get to where it is. I suggest that each of the challenges Ignatieff posits is in fact an aspect of the historical and philosophical extrusion that enables the derivation of a discourse of rights as “freedom from,” as negative liberty, and as “thin,” natural, and intuitively—at least to the Western imagination—unexceptionable.

270. *Id.*

271. *Id.* at 107.

272. *Id.* at 107–08.

273. *Id.* at 108–09. “Rights language cannot be parsed or translated into a nonindividualistic, communitarian framework; it presumes moral individualism and is nonsensical outside that assumption.” *Id.* at 109.

274. *Id.* “Rights are universal because they define the universal interests of the powerless—namely, that power be exercised over them in ways that respect their autonomy as agents.” *Id.*

275. *Id.* at 110. “Human rights exist to adjudicate these conflicts [between individual and group interests], to define the irreducible minimum beyond which group and collective claims must not go in constraining the lives of individuals.” *Id.*

276. Ignatieff, *supra* note 25, at 110.

277. *Id.* at 111.

278. *Id.* at 112. “Indeed, what makes human rights demands legitimate is that they emanate from the bottom, from the powerless.” *Id.*

279. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 118 (2002).

The Islamic or, more broadly, religious challenge, may have been cast in political terms—involving objections that deal with maintaining a particular political and social structure—but the secularity of the provisions and of the discourse as a whole means that the religious perspective is eliminated *tout court*, for better or worse. The Asian challenge also seems to have more to do with political adroitness, with the deployment of competing moral praxes to preserve a form of government and society against the encroachment of a foreign, albeit more liberal, system. Both challenges suggest the function of human rights as a secular religion exploited for political purposes, just as religious factionalism was once exploited within the early modern period by elites to centralize power.²⁸⁰

As for the postmodern challenge it is, in point of fact, none such. Indeed, if postmodernism is understood to be that which comes after modernism, as well as that which either challenges or repudiates the modern, including modernism's faith in grand narratives and universal truths,²⁸¹ and if the UDHR—to take the example provided by Ignatieff—is in fact a document that jettisons various large narratives, such as religion, even as it preserves and reifies rationalism's faith in liberal individualism as the salvation of the future, then the UDHR is both modern and postmodern. The human rights project is itself a sort of enigmatic, amalgamated, and self-critical grand narrative. As Henry Steiner and Philip Alston note, "[a]lthough the frailties of human rights as an ideal or ideology or state practice are evident, that ideal has become a part of modern consciousness, a lens through which to see the world, a universal discourse, a potent rhetoric and aspiration."²⁸² In short, the religious, cultural, and ideological (critical) challenges to the human rights narrative are political. But so is the view of an attenuated human rights discourse that is ostensibly void of political content.

The conceptualization of the international human rights discourse as a bare, minimal set of standards is indistinguishable from the modernist, deeply progressivist quest for purity,²⁸³ the innocence of the naked human body.²⁸⁴ But by embracing only a thin moral doctrine, one is also agreeing with postmodernism that the grand narratives of religious faith, national-

280. See MARX, *supra* note 194, at 9–10, 115.

281. See, e.g., Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 675 (1995); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 726 (1992).

282. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, at v (2d ed. 2000).

283. But cf. VOLF, *supra* note 62, at 84 (arguing that "[p]ristine purity is irretrievable; it can be re-gained neither by going back to the beginnings, nor by plunging into the depths, nor by leaping forward into the future"). Volf, quoting Bernard-Henri Lévy, goes on to elaborate the need for a return to the doctrine of sin: "[T]he stubborn shadows of modernity, produced in part precisely by modernity's blind optimism, call for a judicious retrieval of the doctrine of original sin." *Id.*

284. "In this argument [regarding human rights as the 'basis for deliberation'], the ground we share may actually be quite limited—not much more than the basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me." Ignatieff, *supra* note 25, at 116.

ism, other collective identity markers, and other stories of belonging have now declined and a new age of nomadic, atomized, deracinated individualism²⁸⁵ will herald a bright new future. As Ignatieff puts it,

In such a future, shared among equals, rights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root.²⁸⁶

Theoretically this would include identities of different sorts, including collective identity. But therein lies the contradiction, because the "bare minimum" argument for human identity that explicitly repudiates collective identity (as well as catholic, ecumenical, hybrid, and even dialogical identity)²⁸⁷ is a vision of a postbordered global society. As Volf notes, "A consistent drive toward inclusion seeks to level all the boundaries that divide and to neutralize all outside powers that form and shape the self Radical indeterminacy of negative freedom is a stable correlate of a consistent drive toward inclusion that levels all boundaries."²⁸⁸ In reality, individual and collective identity are not, and cannot be conceived of, as separate;²⁸⁹ neither, for that matter, are the self and other because the former never resides in the abstract and apart from the latter, or does so at its peril.²⁹⁰

285. See, e.g., Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 213 (1999) (maintaining that individualism is an "unrealistic" source of authority because it "subordinat[es] political society to deracinated individual human beings").

286. Ignatieff, *supra* note 25, at 116.

287. See VOLF, *supra* note 62, at 50-55, 91. "[D]oes not identity—even hybrid identity—presuppose boundary maintenance?" *Id.* That is, pure identity imagines itself either as fixed and walled, or as immanent and borderless. In either event, "a soul that is unbound is as mad as one with cemented borders." *Id.* at 91 (quoting GILLIAN ROSE, *LOVE'S WORK: A RECKONING WITH LIFE* 105 (1996)).

288. *Id.* at 63.

289. See, e.g., Sunder, *supra* note 68, at 1403.

Failing to recognize cultural and religious communities as contested and subject to change, legal norms such as the "freedom of religion," the "right to culture," and the guarantee of "self-determination" defer to the claims of patriarchal, religious elites, buttressing their power over the claims of modernizers. Paradoxically, law's failure to question or revisit its old Enlightenment views is obstructing the emergence of the New Enlightenment. In short, human rights law, not religion, is the problem.

Id. Sunder defines the New Enlightenment as "[i]ndividuals in the modern world increasingly demand[ing] change within their religious communities in order to bring their faith in line with democratic norms and practices." *Id.*

290. See VOLF, *supra* note 62, at 63. Volf continues:

Does not such radical indeterminacy undermine from within the idea of inclusion, however? I believe it does. Without boundaries we will be able to know only what we are fighting against but not what we are fighting for. Intelligent struggle against exclusion demands categories and normative criteria that enable us to distinguish between repressive identities and practices that should be subverted and nonrepressive ones that should be affirmed. . . . Second, "no boundaries" means not only "no intelligent agency" but in the end "no life" itself.

To be sure, then, the discourse of human rights is thin, empty, neutral, individualistic, unbounded, and global; yet, simultaneously, it is none of them, even as the human rights doctrine retains its claim to universality. The postmodern "challenge" is in fact embedded within the doctrine: the UDHR is a "child of the Enlightenment[,] . . . written when faith in the Enlightenment faced its deepest crisis."²⁹¹ A further related point is that the thinness of the doctrine, its articulation of a *de minimus* moral equality of all individuals, is neither a value-neutral nor an empty concept. As Richard T. Ford notes, rights have often been thought of as negative freedom, or freedoms from, but in fact they operate in the real world as if they have substantive content: "The conception of rights as *limits* on state power occludes the way rights are a *form* of state power."²⁹² Furthermore, "the discourse of rights hides many of the consequences of rights assertion by presenting rights as a *limit* on state power rather than an exercise of it."²⁹³ Thus, the legacy of postmodernism's critique of universalism, if anything, is that there is always a link between the universal and the particular, or universality and contingency, if only in its traces.²⁹⁴ The thinness of the doctrine as here adumbrated suggests an attempt to delink, and to repudiate, a thick or political description, and to become, in Gillian Rose's expression, a "spectral idea of internationalism."²⁹⁵

Id.

291. Ignatieff, *supra* note 25, at 107. Some have suggested that this crisis of faith precipitated the postmodern critique of modernism, even as the Shoah in Europe reinforced an aspirational rearticulation of the modernist narratives. See, e.g., Tawia Ansah, *Surprised by Sin: Human Rights and Universality*, 30 SYR. J. INT'L L. & COM. 307 (2003).

292. Ford, *supra* note 221, at 63.

293. *Id.* at 65.

294. See, e.g., JUDITH BUTLER ET AL., *CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT* 24-25 (2000). Butler reaches some "preliminary conclusions" about Hegel:

(1) [U]niversality is a name which undergoes significant accruals and reversals of meaning, and cannot be reduced to any of its constitutive "moments"; (2) it is inevitably haunted by the trace of the particular thing to which it is opposed, and this takes the form (a) of a spectral doubling of universality, and (b) a clinging of that particular thing to universality itself, exposing the formalism of its claim as necessarily impure; (3) the relation of universality to its cultural articulation is insuperable; this means that any transcultural notion of the universal will be spectralized and stained by the cultural norms it purports to transcend; and (4) no notion of universality can rest easily within the notion of a single "culture," since the very concept of universality compels an understanding of culture as a relation of exchange and a task of translation.

Id.

295. ROSE, *supra* note 69, at 68. Rose discusses a parallel delinking of morality and materialism, drawing from Jacques Derrida's lecture entitled *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International*:

The New International has no body: so how can it have any members? It has no law, no community, no institutions. This spectral idea of internationalism represents the most explicit emergence of the anarchic utopianism at the heart of postmodern thinking: it is the very antithesis of Marx's "scientific socialism," but it is this antithesis because it projects a science of laws, a determinism, onto Marx's thought which seems utterly ignorant of the debt to Hegel in Marx's method.

Why should this be? What purpose is served by a romantic vision of rights extending the benefits and joys of "moral equality" to individuals across the globe, freeing them from the tyranny of collectivized identities and oppressive groupthink? I suggest that the connection between a thin discourse that highlights and privileges the atomized individual on the one hand, and the discretionary space opened up by the suppression of morality as a political discourse that permits and tempts the sovereign state (self) toward unilateralism on the other, is not accidental, even if unwitting. Both, in fact, are an inheritance of the discursive meeting point of the modern and the postmodern within the formation of the human rights discourse. Without the intention to detract from the very real progress and benefits of liberal individualism, when the story is "crafted in part to 'make us feel that history has a purpose that in some way corresponds with a more positive understanding of human potential,'" ²⁹⁶ we may suddenly apprehend the similarity between this hagiographic myth of progress and the various moral rationales for the deployment of power and for humanitarian interventions, which are more often than not unilateral, or wars. ²⁹⁷

In fine, a story of liberal individualism is crafted as being so limited in its scope, so discursively minimal, that all it "sees," in a sense, is the abject in the present, abject as other to itself. Its vision is that of a future as an escape from human abjection, associated with borders and collective identity markers. Such a story of morality as human innocence—the human category only "is" that which it is not, i.e., tribal, communal, bordered, and oppressed—in fact partakes of the very "challenge" from which it ostensibly escapes: the postmodern predilection with mourning, nostalgia, and despair. The project of innocence as aporetic is understood as the absence of the dialectical embrace of (conversation with) the other, as well as the inability, or refusal, to move *beyond* despair in the acknowledgement of the absence of the other. ²⁹⁸ To make this point more clearly, and to reiterate

Id.

296. VOLF, *supra* note 62, at 59 (quoting Alan Wolfe, *Democracy Versus Sociology: Boundaries and Their Political Consequences*, in MICHÈLE LAMONT & MARCEL FOURNIER, *CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY* 309 (1992)).

297. See, e.g., *id.* at 244. Volf notes:

To reconstruct the past as it actually happened, independent from a particular standpoint, is impossible. To presume otherwise is not only naively mistaken but positively dangerous. *For the claim to universal truth often serves to give legitimacy to very particular interests.* These interests can be noble, like the desire for universal peace in a world torn by war, but they can also be nasty, like the desire to preserve one's own privileged position of power. Think of the "objective" truths about the nature of women or of blacks which were nothing but the cognitive obverse of male and white oppression. Similarly, the communist claim to be the final resolution of the "riddle of history" served only to bolster the oppressive power of the Party over all domains of people's lives. Such objective truths are terrible weapons, effective because they generate the illusion of their own inescapability, deadly because they exude innocence.

Id. (emphasis added).

298. With positive law's exclusion of morality, postmodernism—or at least deconstruction—develops a theory of law as "fallen, violent and unredeemable." See ROSE,

the centrality of an ethics of exclusion, atomization, and negation to the politics of moral exceptionalism, I will examine the relationship between modern secular morality, the self as morally innocent, and the achievement, under the diremption of law and morality, of a state of emergency necessitating the war paradigm as moral resolution of interstate conflict.

III. Innocent Self, Sinful Other: Consequences of Moral Purity

Notwithstanding the valid and even good reasons for the exclusion of God during the drafting of the UDHR, one important, but largely invisible consequence—invisible precisely because the story of a progressive march toward tolerance and inclusion is amnesiacal—is the construction of the self as innocent within the category of the moral, such that ethical action is inherently redemptive of the other.²⁹⁹ The self as innocent also means that its action, especially the deployment of force to achieve the just cause or the moral outcome, is ostensibly pure. This obviates the extent to which the moral is exploited by power outside the realms of juridical scrutiny or review and the extent to which the moral functions as an alternative, and

supra note 69, at 69 (characterizing Walter Benjamin's philosophy of law). But Rose goes on to caution:

For if all human law is sheer violence, if there is no positive or symbolic law to be acknowledged—the law that decrees the absence of the other, the necessity of relinquishing the dead one, returning from devastating inner grief to the law of the everyday and of relationships, old and new, with those who live—then there can be *no work*, no exploring of the legacy of ambivalence, working through the contradictory emotions aroused by bereavement.”

Id. at 70. That is, in addition to the embrace of the other there must also be a willingness to embrace the absence of the other, both being constitutive of the self. Hence Volf's dual definition of exclusion:

Exclusion takes place when the violence of expulsion, assimilation, or subjugation and the indifference of abandonment replace the dynamics of taking in and keeping out as well as the mutuality of giving and receiving.

... To avoid becoming caricatures of one another and, caught in the vortex of de-differentiation, finally ending in a “formless void,” we must refuse to consider boundaries as exclusionary. Instead, what is exclusionary are the impenetrable barriers that prevent a creative encounter with the other. They are a result either of expulsion or indifference.

VOLF, *supra* note 62, at 67.

299. Compare the self as sinful (discussion *infra*), whereby moral intervention is a form of self-redemption. See, e.g., KRISTEVA, *supra* note 28, at 118–19.

[M]an is a spiritual, intelligent, knowing, in short, speaking being only to the extent that he is a recognizant of his abjection—from repulsion to murder—and interiorizes it as such, that is, symbolizes it. The *division* within Christian consciousness finds in that fantasy, of which the Eucharist is the catharsis, its material anchorage and logical node . . . I am divided and lapsing with respect to my ideal, Christ, whose introjection by means of numerous communions sanctifies me while reminding me of my incompleteness. Because it identified abjection as a fantasy of devouring, Christianity effects its abreaction.

Id. Thus, the theological conception of self beginning in sin incorporates the other as both emblematic (e.g., Eucharist as catharsis) and aporetic (e.g., Eucharist as “taming cannibalism”). See *id.* at 118.

self-evidently pure, source of power and authority.³⁰⁰

Volf, however, notes:

There is no escape from noninnocence, either for perpetrators or for victims or for a "third party." Pristine purity is irretrievable; it can be re-gained neither by going back to the beginnings, nor by plunging into the depths, nor by leaping forward into the future. Every person's heart is blemished with sin; every ideal and project is infected with corruption; every ascription of guilt and innocence saddled with noninnocence. This, I think, is what the doctrine of original sin teaches. [Volf concludes that] [i]n the wake of modernity's belief in progress, the doctrine was progressively dismantled.³⁰¹

One means of integrating the effects of diremption (foundational exclusion) is to reconsider the doctrine of sin, the concomitant doctrine of faith, and its suppression and subsequent transmutation at the heart of secular moral discourse. The theological argument for reevaluation suggests the following: (1) that the disestablishment implied by the rhetoric of religion in time of war is a direct consequence of secular morality's posit to positivist law (i.e., as marginal discourse in view of law's originary repudiation of religion); (2) that the confluence of modernism and postmodernism within secular morality has given birth to this fraught purity of Enlightenment rationalism with a fixation on death and the abject;³⁰² (3) that this purity in turn constitutes the self of secular morality in relation to the other; and (4) that the hubristic innocence of the postabject self (as expulsion of the other) is directly linked to the unilateral, isolationist moral actor in its relation to international law, suggesting that (5) the prevailing paradigm for conflict resolution (both individual and state) will continue to be one of violence and war. This reflects morality's loss of faith as an end and limit of the rational, whereby morality is founded upon the failure of the logos. In short, a primordial consequence of a deracinated morality (naked space) is that it renders it impossible to see reality except through the eyes of a deracinated self. But it is precisely this blindness of the self that propels, or creates, the narrative momentum³⁰³ of the self's morally fractured (encoded, suppressed, and severed) desire for the law.

300. See ROSE, *supra* note 69, at 71 (adumbrating an account of modern ethics "where the discourses of individual rights distract from the actualities of power and domination").

301. VOLF, *supra* note 62, at 84. Volf continues: "As Bernhard-Henri Lévy rightly argued in *Dangerous Purity* . . . , the stubborn shadows of modernity, produced in part precisely by modernity's blind optimism, call for a judicious retrieval of the doctrine of original sin." *Id.*

302. See, e.g., ROSE, *supra* note 69, at 130-31 ("If this argument [regarding scientific progress] captures the aspiration of enlightenment, then the destructive potential of modern science, the rationalisation of death in modern warfare and genocide, is often cited as the complementary devastation of the traditionally meaningful experience of death.").

303. MILES, *supra* note 61, at 89 ("The interactions that result from [the lack of recognition of Jesus's identity] create much of the forward narrative momentum in the Gospels as the reader begins to strain forward psychologically, seeking an interlocutor who will finally realize the truth.").

I have commented on the messianism of the human rights movement.³⁰⁴ Ignatieff himself has noted that human rights “has become the major article of faith of a secular culture that fears it believes in nothing else.”³⁰⁵ The religiously pregnant language of moral discourse at the international level is no accident. As an instance of literary creativity—the story of rationalism and its apotheosis in the positive reduction to a moral code for all nations through all time—international juridical morality invites the kind of “close scrutiny”³⁰⁶ associated with religious texts. As Jack Miles has noted, “the habits of biblical exegesis, as they have been crystallized and secularized, have led in the West to a relative scripturalization of all imaginative literature—indeed all imaginative production.”³⁰⁷ One could then read, for instance, Ignatieff’s “what is pain and humiliation for you”³⁰⁸ as archetypal, in literary terms, of the crucifixion. The significance of this literary reading is that it highlights the persistence, as Volf calls it, of the exclusionary procedure at the heart of the moral narrative: The expulsion of God has led to his return, but in an attenuated, allusive, and refracted sense.³⁰⁹ The absence of religion, in short, has led to the religiosity of the ego, the autonomous I.

How does this work? Partly, it works through the capacity to see the world only “from here,” and not “from there.”³¹⁰ This much is certainly true if the only arbiter of commonality is that of “pain and humiliation,” for at its core, as Elaine Scarry has noted, pain is doubt: “Intense pain is world-

304. See *supra* Part II.A.

305. Michael Ignatieff, *Human Rights: The Midlife Crisis*, THE NEW YORK REVIEW OF BOOKS, May 20, 1999, at 58 [hereinafter *Human Rights: The Midlife Crisis*].

306. MILES, *supra* note 61, at 42.

307. *Id.*

308. *Human Rights: The Midlife Crisis*, *supra* note 305, at 62 (“[W]hat is pain and humiliation for you is bound to be pain and humiliation for me.”).

309. VOLF, *supra* note 62, at 310, in reference to the “imitation” of God:

There is a duty prior to the duty of imitating God, and that is the duty of *not wanting to be God*, of letting God be God and humans be humans. Without such a duty guarding the divinity of God the duty to imitate God would be empty because our concept of God would be nothing more than the mirror image of ourselves.

Id.

310. *Id.* at 251. This differs from Volf’s argument. Volf describes Thomas Nagel’s argument: Nagel concludes that to know the world adequately, one must see the world from both “there,” meaning a view of what the world would be like from no point of view, and from “here,” meaning one’s own perspective. *Id.* at 250–51. One advantage of the presence of God is that the I is presented with an alternative paradigm of how to see the world outside itself: “God’s eternal truth is *panlocal* . . . This is why God’s truth is not simply one among many perspectives, but *the truth* about each and all perspectives.” *Id.* at 250. As such, Volf suggests:

In a creaturely way we should try to emulate God’s way of knowing. Not that we can crawl inside the mind of God and see things from God’s panlocal perspective. But we can try to see the other concretely rather than abstractly, from within rather than simply from without. What human way of seeing corresponds to God’s seeing “from everywhere”? Seeing both “from here” and “from there.” Only such double vision will insure that we do not domesticate the otherness of others but allow them to stand on their own.

destroying.”³¹¹ But this, being the substance of radical individualism as de minimis moral paradigm, is precisely the institution of the contingency of truth as solely produced or constructed by power or, using Michel Foucault’s term, as “truth-effects.”³¹²

Volf’s critique of Foucault’s (postmodern) understanding of truth is persuasive. He argues that truth as mere effect means:

We swim in an ocean of distortions and deceptions, and the truth seems impotent to sustain us. You trust the power of truth but the “truth” of power proves stronger—that iron fist in a velvet glove of statistics, research results, pronouncements by undisputed authorities, of appeals to tradition or common sense. The only sensible thing seems to return in kind, to define your own truth and assert it in the face of your opponents with the help of intimidation, propaganda, and manipulation.³¹³

As such the moral enquiry ends in a failure of words: “When opinions clash, weapons must ultimately decide because arguments are impotent.”³¹⁴

Volf’s description of the insufficiencies of both the modernist and postmodernist’s relationship to truth depends upon the exclusionary procedure at the foundation of secular morality. As with the discourse and the capacity to see the other, it is difficult, given the radical severance between your pain (truth) and my doubt, to imagine seeing “the other concretely rather than abstractly, from within rather than simply from without,” pursuant to the initial exclusion of the other from within.³¹⁵ As such, the moral self, idealistic and romantic, struggles only and always *against* the ideal of the negative, the aporetic freedom. Specifically as paradigmatic of the rejection of religion and, thereby, as the mythic beginning of history (new moralism), secular individualism—as the negative ideal—rests on a foundation and persistence of refusal. The new moralism of international juridical discourse delivers us to the failure of words, intimating the dominance of power,³¹⁶ as well as purity’s dangers³¹⁷ and the seductions of

Id.

311. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 29 (1985) (discussing pain in the context of interrogation and torture).

312. VOLF, *supra* note 62, at 249 (“[Foucault] is not interested in ‘truth’ but in what passes for truth, in what he calls ‘truth-effects.’”). Volf discusses Foucault’s analysis of the relationship between truth and power: “Truth, [Foucault] claims, is produced, constructed, imposed; [truth] is what *passes for true*,” and further, “[i]f truth is imposed there can be no gain in knowledge, but there can be gain in power.” *Id.* at 248.

313. *Id.* at 249.

314. *Id.*

315. *Id.* at 251.

316. For a discussion of the diverging views of Europe and the United States regarding the question of power, see Robert Kagan, *Power and Weakness*, POLICY REVIEW, June/July 2002, available at <http://www.policyreview.org/JUN02/kagan.html>. Europe is “moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation,” while the United States still relies on power, notably the use of force, in its foreign affairs. *Id.* at 3–4.

317. This phrase is derived from Mary Douglas’s seminal work on purification rites. See MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1966).

terror.

Conclusion

I began this Article with a story of moral conflict. As a debate that is internal to the secular moral discourse that we take for granted, there was an implicit sense in which one could recognize therein an investment in words and a faith in the power of persuasion. For example, Johnson's passionate opposition to Singer's "terrible purity" would stanch, and possibly preclude, the latter's victory at the legislature. But the story hints at what happens when words fail: Singer's "overarching respect for the individual's preference for life" might, as Johnson says, be considered "a fiction, a fetish, a quasi-religious belief."³¹⁸ But, she wonders, "[W]hat if that view wins out, but you can't break disability prejudice? What if you wind up in a world where the disabled person's 'irrational' preference to live must yield to society's 'rational' interest in reducing the incidence of disability?"³¹⁹ Johnson has no rebuttal except faith: "I know it's happened before . . . But it won't happen. I have to believe that."³²⁰

Kierkegaard suggests that faith is a paradox because "the single individual is higher than the universal, [but] the single individual . . . determines his relation to the universal through his relation to the absolute, not his relation to the absolute through his relation to the universal."³²¹ Johnson's faith that "[Singer] won't succeed in reinventing morality,"³²² and that "he isn't killing anyone[;] [i]t's just talk,"³²³ faces a different test when the efficacy of argument (*logos*) is juxtaposed against the possibility of a strong, or violent, assertion of the will. This test is one under international law, which is the *logos* that constrains the state's discretionary violence. Johnson can posit "faith" as the end of thought and of reason.³²⁴ Within rational, public discourse, faith, as a symbol of the "irrational," is a potent check on untrammelled reason and unbridled will. The removal of religion as a peripheral part of the public juridical dialogue from the naked space of secular morality limits the constraining power of discourse (the word) and widens the state's discretion, precisely through this repudiation

318. Johnson, *supra* note 1, at 79.

319. *Id.*

320. *Id.*

321. KIERKEGAARD, *supra* note 137, at 97-98. Moreover,

The paradox of faith has lost the intermediate term, i.e. the universal. On the one hand it contains the expression of extreme egoism (doing this dreadful deed for his [i.e., Abraham's] own sake) and on the other the expression of the most absolute devotion (doing it for God's sake). Faith itself cannot be mediated into the universal, for in that case it would be cancelled. Faith is this paradox, and the single individual is quite unable to make himself intelligible to anyone.

Id. at 99; see also Hannay, *supra* note 58, at 11 (noting that faith is "something we cannot explain in any language that suffices for people to describe and justify their actions and attitudes to one another").

322. Johnson, *supra* note 1, at 79.

323. *Id.*

324. See *id.*

of the absurd.³²⁵ The failure of law, of the word, is both cause and effect of the seduction of violence as redemption.

As the United States and its allies went to war against Iraq, the moral cause, or "just war" rationale, prevailed as each of the other reasons that were proffered—the WMD issue, the link to Al Qaeda, the deterrent effect regarding Iraq's nuclear-leaning neighbors, even "regime change"—seemed to founder.³²⁶ That Saddam Hussein presided over a despotic and "evil"³²⁷ regime became reason enough to go to war, and reason enough for morality to prevail over international law³²⁸ and for violence to prevail over words.

But what these debates highlighted was a tension between morality and law that precedes the war against Iraq or, for that matter, the war on terrorism. These wars have clarified the ontological tension and the consequences of an age-old severance between the legitimating sources of power and authority at the international level. I have attempted to show in this Article the historical and philosophical roots of the exclusion of morality from law, or the segregation of morality to the "private," extralegal realm, outside of law's "public," rationalist discourse. I have suggested that the exclusionary procedure that marks this segregation began with the severance of religion from secular morality and continued or "persisted" with the diremption of ethics and law at the international level.

The end of the last century was characterized by the rise of the human rights discourse and morality more generally as part of foreign policy. It

325. Kierkegaard discusses Abraham and his faith as the "absurd." KIERKEGAARD, *supra* note 137, at 54 ("But Abraham had faith and did not doubt. He believed the ridiculous.").

326. See, e.g., Stevenson, *supra* note 249 (discussing Tony Blair's defense of the war in the face of criticism of the unlikelihood that WMD will be found in Iraq); *The Conflict Over War: After 18 Months, What Should We Do?* WASH. POST, Oct. 7, 2004, at C14 (stating that the September 11th Commission has recently stated that Iraq and Al Qaeda were not working together); Roland Watson & Charles Bremner, *Bush Threatens Iran with Action To Halt Its Nuclear Ambitions*, THE TIMES, June 19, 2003, at 14 (discussing President Bush's intolerance of Iran's nuclear ambitions).

327. See, e.g., Elisabeth Bumiller, *Even Critics of War Say the White House Spun It with Skill*, N.Y. TIMES, Apr. 20, 2003, at B14.

"As far as how you justify a war, [the Administration has] pretty much done it by formula' You construct the image of the enemy as savage and barbarian. Then there are all sorts of efforts to show that the good guys represent the forces of civilization freedom, democracy, human rights. And of course there's the implication that we fight on the side of God."

Id. (quoting Robert L. Ivie, professor of communication and culture at Indiana University). Bumiller adds: "As early as last summer, President Bush's principal advisers carefully planned a campaign to characterize the war as a blow for freedom." *Id.*

328. See, e.g., Gary Rosen, *What Would Woodrow Wilson Do?* N.Y. TIMES BOOK REV., Apr. 13, 2003, at 11.

[F]or [Paul] Berman, the real rationale for "going after Saddam" was "Wilsonian, in a militant version"

He advocated toppling Saddam Hussein not to destroy his fearsome weapons but, more grandly, to repudiate his vicious regime.

Id.; see generally WILLIAM J. BENNETT, *WHY WE FIGHT: MORAL CLARITY AND THE WAR ON TERRORISM* (2002) (arguing that while the United States's actions in the wake of September 11th are condemned by some, they are morally justified).

also experienced the increasing acceptance of military interventions (wars) conducted on the basis of a moral authority (humanitarianism) that presumably trumps the rigors and limitations of positive international norms governing the use of force. Nevertheless, positivism has maintained and policed the conceptualizations of sovereignty as state-centric and of a legal framework that essentially favors the state as the source of legal authority within international relations. Moreover, the extralegal moral jurisdiction or authority is determined, articulated, and projected as an instantiation of *juridical* power (state-centric positive law). This results from our understanding that the moral category is itself a specific style or interpretation of the relationship between the individual and the state or the individual and the world.

Human rights discourse as an extralegal juridical authority,³²⁹ cast as a limit upon state power, clarifies both the extent to which morality is conceived as the “private,” extralegal domain, as well as the propulsion to conceive morality—“the most virtuous act”³³⁰—as severed from political power. It is within that lacuna that power exploits the moral category as an alternative or competing source of authority. Although this is not new, for power has always used collective identifications (religion, ideology) to rally support “from beneath” to acquire authority and centralize its power, what is different in the age of both WMD and of single superpower politics is that the rationale for a persistence of the public/private, law/morality divide is a dynamic or ethic of exclusion translated to the global arena. Cast in theological terms, when public identity markers have been relegated (repressed) to the private, and they cannot be expected to have any explanatory or descriptive power within a public discourse that determines the parameters of the *constitution* of those identity markers, then those repressed elements or narratives cannot but engender a deracinated view of the world, of the self, and of reality. The currency, persistence, and naturalization of such dichotomies and exclusions mean that the political exploitation of the (moral) abject seems feasible and inevitable. And because such exclusionary procedures and commitments are often attended with violence, the relationship between modern secular morality and international law ratifies and renders virtually unexceptionable the instauration of the war paradigm as the apotheosis of enlightened public, rational debate within the contemporary construction of the naked space.

I have argued that that which is extrinsic and foreign to the naked public space not only, by its elision, enables a distorted and exploitable

329. See, e.g., Sunder, *supra* note 68, at 1402.

Premised on a centuries-old, Enlightenment compromise that justified reason in the public sphere by allowing deference to religious despotism in the private, human rights law continues to define religion in the twenty-first century as a sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected. Law views religion as natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the “other” of international law.

Id.

330. Anderson, *supra* note 239.

return of the repressed abject, but also, like the Eucharist, is accessible to the self as a "reservoir" of creativity and power.³³¹ This is true when we consider the ways in which, without completely collapsing the borders between the public and the private, the secular and the religious, we nonetheless see the porosity of those borders. When both inside and outside apprehend that transmigration of the religious to the secular, then they have already invested in the public domain the same despairing hope and salvific desire; as Christians not only live and die in Christ,³³² so also even the "pragmatic atheist" has always and already lived and died in the *idolum* (idol, idolatry, sin).

Exclusion as ontology has required that the *idolum* is created in the image/*imago*³³³ of the unfettered and unlimited I beyond faith (Hegelian faith as beginning), beyond sin, and within an abstracted and oppressive rationalism. The turn to morality, the return to faith and the absurd as the limit of thought does not, I submit, mean that the bulwark between Church and State is collapsed, any more than it means the usurpation of rationalism by the narratives of blood and soil. But it does posit the recognition that the public space involves a choice between a negative conception of freedom (recalcitrant, idealistic) and a thick description: compromised, antagonistic, strategic.

The prescription here is neither easy nor intuitive: to instrumentalize a discursive frame so rebarbative and instinctively repugnant to the secular mind that its mere invocation is enough to calcify the borders of separation within the imagination. But it is precisely at this border of exclusion, where the exotic and hybrid Other is celebrated, and where the violent, anomalous or repudiated Other—enraged, invested, revolting—is feared and rejected, that the work of critical engagement must begin. The alternative? The savage purity of the clean and proper body, an impossible quest, projects and ultimately reifies an embattled defense of the naked, negative space. If we imagine this space, like the law, as the public square, then its nakedness and evisceration propels the kind of statism and unilateralism, on the one hand, that bequeaths the turn to moral exceptionalism and a loss of faith in the law, on the other.

331. See COUNTRYMAN, *supra* note 24, at 17.

332. See, e.g., McCarragher, *supra* note 131, at 3 (noting that "i_ek doesn't fully appreciate Paul's point: that we rise as well as die with Christ").

333. Image is here referenced as the *imago*, a child's play, suggesting innocence, egotism and scatological insouciance.